SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 745

THE SCHENECTADY UNION PUBLISHING COMPANY, PETITIONER,

vs.

MARTIN L. SWEENEY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 22, 1942.

—8876

[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MARTIN L. SWEENEY, Plaintiff-Appellant,

vs.

THE SCHENECTADY UNION PUBLISHING COMPANY, Defendant-Appellee

STATEMENT UNDER RULE XIII

Summons issued out of the United States District Court for the Northern District of New York and was served upon defendant on December 13, 1939. Bill of Particulars filed January 20, 1940. Answer filed February 2, 1940. Notice of Motion for judgment on the pleadings served September 10, 1940, returnable before the Honorable Frank Cooper, United States District Court Judge on the 21st day of September, 1940. Parties appeared and argued motion on said date and submitted briefs. Opinion of the court handed down January 8, 1941, granting the motion. Order dismissing complaint entered in the office of the Clerk of the United States District Court for the Northern District of New York on the 15th day of January, 1941. Judgment dismissing the complaint and for costs in the sum of $28.50 entered in the office of the said Clerk on the 15th day of February, 1941. Notice of appeal filed by plaintiff-appellant in the office of the said Clerk on the 11th day of February, 1941. Thereafter and on the 28th day of February, an order was made by the Honorable Frank Cooper, upon the Stipulation of the attorneys herein, amending the notice of appeal to include the judgment entered on the 15th day of February, 1941, which order and notice of appeal were filed in the office of said Clerk on March 1st, 1941.

[fol. 2] This is an appeal from an order dismissing the complaint of the plaintiff herein on the ground that it failed to set forth facts sufficient to constitute a cause of action and from the judgment entered on such order.

There has been no change in parties or their attorneys since the commencement of this action.

IN DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK

Civil Action 302

MARTIN L. SWEENEY, 1628 Columbia Road, Dover Center, Ohio, Plaintiff,

vs.

SCHENECTADY UNION PUBLISHING COMPANY, Defendants

COMPLAINT

Complaint of Martin L. Sweeney, through his attorneys, DeGraff and Foy, respectfully shows to the Honorable Court as follows:

1. The plaintiff is a citizen of the State of Ohio; and the defendant, Schenectady Union Publishing Company, is a corporation incorporated under the laws of the State of New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars ($3,000.00).

2. The defendant, Schenectady Union Publishing Company, during the time hereinafter mentioned was, and still is, the publisher of a certain newspaper or periodical known as and called the "Schenectady Union Star," which news- [fol. 3] paper or periodical is widely circulated and read in the State of New York and the states of the United States and among the people thereof.

3. The defendant is sued for damaging and injuring the plaintiff through the processes of libel as hereinafter more fully will appear and because the defendant composed, wrote, published, circulated, distributed and caused to be composed, written, published, circulated and distributed, the libel hereinafter set forth.

4. That whereas the plaintiff was, and still is, a duly elected Member of the Congress of the United States from the State of Ohio and has been such for over seven years, and an Attorney at Law in good standing as a member of the Bar in the State of Ohio and until the commission of the grievances hereinafter set forth, was not suspected of conduct, practices, or prejudice toward his constituents, clients

or fellowman because of race, creed or color, or lacking in respect for religious and racial tolerance for the tasks incident to the carrying out of his duties as a duly elected representative of the people of the State of Ohio and as a practicing attorney in the State of Ohio.

5. Yet the defendant, well knowing the premises, but contriving and intending to injure plaintiff and deprive him of the respect, confidence and esteem peculiarly essential to plaintiff's profession and office, and contriving and intending to deprive plaintiff of his good name, reputation and the esteem of his constituents and clients, and to bring him into disastrous scandal, ridicule, and professional disrepute, before his constituents, clients, professional associates, friends, neighbors, acquaintances, and the public in general, and to hold plaintiff up to public scorn, contempt, ridicule and disgrace, did heretofore, to wit, on or about the 23rd day of December, 1938, falsely and wrongfully publish and circulate of and concerning the plaintiff, in the said "Schenectady Union Star" under the title or heading of "Washington [fol. 4] Daily Merry-Go-Round," the following false, scandalous and defamatory libel: ·

"A hot behind-the-scenes fight is raging in Democratic congressional ranks over the effort of Father Coughlin to prevent the appointment of a Jewish judge in Cleveland.

"The proposed appointee is Emerich Burt Freed, U. S. District Attorney in Cleveland and former law partner of Senator Bulkley, who is on the verge of being elevated to the U. S. District Court.

"This has aroused the violent opposition of Representative Martin L. Sweeney, Democrat of Cleveland, known as the chief congressional spokesman of Father Coughlin.

"Basis of the Sweeney-Coughlin opposition is the fact that Freed is a Jew, and one not born in the United States. Born in Hungary in 1897, Freed was brought to the United States at the age of 13, was naturalized 10 years later.

"Irate, Representative Sweeney is endeavoring to call a caucus of Ohio Representatives December 28 to protest against Freed's appointment."

The foregoing was meant and intended to convey that plaintiff was and is guilty of Un-American, racial prejudice against persons of Jewish origin and guilty of conduct unbecoming a public officer and to hold plaintiff in contempt

in the eyes of his constituents and clients he represents in a professional capacity.

6. By reason of the aforesaid publication and its wide circulation in the State of New York, the states of the United States, and among the people thereof, plaintiff has been greatly injured in his good name, fame and reputation, in the conduct and execution of his official duties as a duly elected and chosen representative of the people of the State of Ohio in the Congress of the United States, in pursuance of his profession as a practicing attorney in good standing before the Bar in the State of Ohio, in his standing in the [fol. 5] community wherein he resides, and in the high regard, respect, confidence and esteem he has hitherto enjoyed among his associates both in the Congress of the United States and in the legal fraternity and elsewhere, as aforesaid, in the sum of Two Hundred and Fifty Thousand Dollars ($250,000.00).

Wherefore, the plaintiff brings this, his suit, and claims damages of the defendant in the sum of Two Hundred and Fifty Thousand Dollars ($250,000.00), besides costs.

George W. Foy. DeGraff and Foy, Attorneys for Plaintiff, Office and P. O. Address, 11 North Pearl Street, Albany, New York.

IN UNITED STATES DISTRICT COURT

ANSWER

The defendant Schenectady Union Publishing Company, for an answer to the complaint.

I

For a first separate and complete defense.

1st. Admits its incorporation and that it is and was the publisher of that certain daily newspaper "Schenectady Union Star," published in the City of Schenectady, N. Y.

2nd. Admits that on or about December 23rd, 1938, it published in its newspaper aforesaid under the title or heading of "Washington Merry-Go-Round" an article containing, among many other news items of timely interest,

the matters alleged in the complaint and in plaintiff's Bill of Particulars.

3rd. Admits that plaintiff has brought this action for damages for an alleged libel.

[fol. 6] 4th. Admits upon information and belief that plaintiff was and still is a member of Congress of the United States from District of Ohio and has been such for over seven years and is an Attorney at Law and a member of the Bar of the State of Ohio.

5th. Denies the allegation contained in paragraph 1 of the complaint that the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand dollars ($3,000).

6th. Denies upon information and belief that until the alleged grievances complained of in the complaint, plaintiff was not suspected of prejudice towards his fellowman because of race, creed or color and was not suspected of being lacking in respect for religious and racial tolerance but except as thus admitted or denied, states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of the complaint except as heretofore expressly admitted.

7th. Denies each and every other allegation in said complaint contained.

II

Defendant further answering the complaint and for a second separate and complete defense alleges upon information and belief.

8th. Realleges each and every admission and denial of the first defense as though re-written here.

9th. Avers that the published article complained of in said complaint is a true, correct and impartial report of facts that actually occurred and as written in said article and that the comment thereon of the plaintiff, a member of Congress of the United States, is fair, and is therefore privileged and that each and all of the matters set forth in said article a copy of which is annexed hereto as Schedule "A," which plaintiff in his Bill of Particulars claims and relies on as false and untrue, were and are true.

[fol. 7] III

Defendant further answering the complaint and for a partial defense and in mitigation of any damages to which plaintiff might otherwise appear to be entitled, alleges upon information and belief.

10th. Realleges each and every admission and denial contained in the defenses herein numbered "I" and "II," as though re-written here.

11th. Avers that prior to and at the time of the publication of the article complained of, this defendant by an agreement with United Feature Syndicate, Inc., a well known reputable and trustworthy news agency, received and paid for and published a certain syndicated and copyrighted news article entitled "Washington Merry-Go-Round," written by Drew Pearson and Robert S. Allen coauthors, and that the news and matters therein were received and gathered by the said Drew Pearson and Robert S. Allen from their various agents, reporters and correspondents in the City of Washington, D. C., and throughout the United States.

12th. Avers that said article complained of was with other news dispatches and in the usual course of its daily business received by this defendant from the said United Feature Syndicate, Inc.

13th. Avers that this defendant received the said article in its usual course of business and in good faith and believed the same to be true, and relied upon the previous accuracy and truth of many other articles of news previously received from the said Drew Pearson and Robert S. Allen and upon its and their good reputation for truth and veracity, and this defendant denies that it acted maliciously and further alleges that believing said article to be true, this defendant, in good faith and without malice and with no intent to injure or harm or defame the plaintiff, published the same in the same form as received and without [fol. 8] suggestion or comment of its own, and as a copyrighted article of news, and that a true copy of said article as published on or about the 23rd, day of December, 1938 is hereto annexed marked Schedule "A" and made a part hereof.

14th. Avers that this defendant had heretofore and at all times found the news articles under the title "Washington Merry-Go-Round," written by Drew Pearson and Robert S. Allen and distributed and sold by the said United Feature Syndicate, Inc., news service and agency to be truthful and reliable and that the said co-authors at all times employed careful and trustworthy and competant agents, correspondents, reporters and editors and they were relied upon and their articles believed to be true by defendant at the time of the publication complained of and were calculated to and did induce in defendant the belief that said publication was true.

15th. Avers that said article was published as an item of news and in good faith and without malice and with no intent to injure or harm or defame the plaintiff, and the defendant believed the statements contained in said article to be true when made and fair comment of the plaintiff and defendant denies that it acted maliciously or with any intention whatsoever to injure or harm or defame or damage the plaintiff.

16th. Avers that said article Schedule "A" parts of which are complained of in the complaint and which is also set forth in plaintiff's Bill of Particulars was intended to be a fair and true report and comment upon, the official conduct of a public official concerning a matter of public interest and importance; and that said article was not written or published maliciously or otherwise or for the purpose of causing harm to the plaintiff.

IV

The defendant for a further answer to the complaint alleges:

[fol. 9] 17th. Particularly denies each and every allegation in the complaint that alleges that the plaintiff sustained damages.

Wherefore, defendant demands judgment dismissing the complaint together with the costs of this action.

Charles G. Fryer, Attorney for Defendant, 243 State Street, Schenectady, N. Y.

The defendant demands a Trial by Jury.

SCHEDULE "A" ANNEXED TO ANSWER

THE WASHINGTON MERRY-GO-ROUND

(Trademark)

Story of Christ-Child, Son of Transients, to be Dramatized for Migrant Farm Workers—Stock Exchange Faces Drastic Action for Sidestepping Whitney Case

December 23, 1938.

By Drew Pearson and Robert Allen

Washington, Dec. 23—A hot behind-the-scenes fight is raging in Democratic Congressional ranks over the effort of Father Coughlin to prevent the appointment of a Jewish judge in Cleveland.

[fol. 10] The proposed appointee is Emerich Burt Freed, U. S. District Attorney in Cleveland and former law partner of Senator Bulkley, who is proposed for U. S. District Court.

This has aroused the violent opposition of Representatives Martin L. Sweeney, Democrat of Cleveland, known as the chief Congressional spokesman of Father Coughlin.

Jew, Born in Hungary

Basis of the Sweeney-Coughlin opposition is the fact that Freed is a Jew, and one not born in the United States. Born in Hungary in 1897, Freed was brought to the United States at the age of 13, was naturalized ten years later.

Irate, Congressman Sweeney is endeavoring to call a caucus of Ohio Congressmen December 28 to protest against Freed's appointment.

The First Transient, Christmas 1,938 Years Ago

Big problem facing Farm Security Administration is that of migrant agricultural workers in California. But for one day this week there will be no problem. Henry Wallace and Hollywood are banding together to wipe out the worries of migrant workers Saturday.

Hollywood big shots—including Eddie Cantor, Miriam Hopkins and Herbert Marshall—will stage a radio dramati-

zation of the life of a transient, as it has not been presented since the First Transient Family sought shelter 1,938 years ago.

The scene will be as humble as the scene at Bethlehem. It will be the FSA camp at Shafter, California. Every child among Kern County's agricultural workers has been invited, many of them Mexicans and Negroes.

Some of the workers will take part with Hollywood stars in a series of sketches, and the children will take home bountiful Christmas stockings. Stars are contributing not [fol. 11] only talent but funds. One star gave a fund-raising party last week that netted $500.

NBC will carry the broadcast, beginning at 2:30 Pacific time, Saturday. Titled "Christmas for One-Third of a Nation," the party will bring comfort and joy to those who wander under conditions not unlike those experienced by Joseph and Mary twenty centuries ago.

Social Whirl

At White House receptions, as guests come abreast of the President to shake hands, they are counted by a White House policeman, who rings them up with a little tabulator held in his hand.

The average number at a single reception is just over 1,000 which is too many to be fed with home-made cookies. They are bought outside • • • As many as 40 or 50 different establishments supply the White House • • • Twenty-seven government greenhouses are searched for their best blossoms whenever the White House stages a big reception • • • In the pre-Roosevelt days, guests used to line up in the state dining room and move east to pass the President. Now they gather in the East Room, and move west. Reason for the change is that pre-Rooseveltians didn't feed the guests, and the dining room was bare. Now its tables are laden, and guests come to it only after they have been officially received.

First Round in Stock Exchange

The governors of the New York Stock Exchange haven't heard the last of their refusal to act on the sizzling SEC report on the Richard Whitney scandal.

Dr. Robert M. Hutchins, Chicago University's, youthful president and representative of the public on the Stock Exchange board, resigned because it would not crack down

on J. P. Morgan, Thomas Lamont, E. H. Simmons and other Wall Street moguls involved in the Whitney mess. [fol. 12] But this resignation was just the opening of the fight.

Hutchins demanded action on the SEC report after the Exchange rulers had sidestepped it for two months. He argued that the Exchange could not apply the rod to small fry and pussyfoot on big shots if it wanted to convince the public it could govern itself and keep a clean house.

Douglas vs. Morgan

It is a sure bet that Douglas, chairman of SEC, will not muff the Hutchins' pass. The Morgan group which balked Hutchins have been Douglas' bitterest foes in Wall Street, and he is not the kind to take anything lying down.

Until this incident, Douglas played ball with the "reform" administration that came into Exchange control last spring after the Whitney Scandal.

With the Exchange board backing away from punishing Whitney's colleagues, the next move will come from the SEC. It has the power to lay down Exchange regulations and that is exactly what it plans.

(Copyright, 1938, by United Feature Syndicate, Inc.)

(Verification.)

[fol. 13] In United States District Court

Plaintiff's Bill of Particulars

Plaintiff, for a bill of particulars in the above entitled action, alleges:

1. That the entire article, as it appeared in the Schenectady Union Star on December 23, 1938, is as follows:

"The Washington
Merry-go-round

(Trademark)

Story of Christ-Child, Son of Transients, To be Dramatized for Migrant Farm Workers—Stock Exchange Faces Drastic Action for Sidestepping Whitney case

by Drew Pearson and Robert Allen

Washington, Dec. 23—A hot behind-the-scenes fight is raging in Democratic Congressional ranks over the effort

of Father Coughlin to prevent the appointment of a Jewish judge in Cleveland.

The proposed appointee is Emerich Burt Freed, U. S. District Attorney in Cleveland and former law partner of Senator Bulkley, who is proposed for U. S. District Court.

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Basis of the Sweeney-Coughlin opposition is the fact that Freed is a Jew, and one not born in the United States. Born in Hungary in 1897, Freed was brought to the United States at the age of 13, was naturalized ten years later.

Irate, Congressman Sweeney is endeavoring to call a [fol. 14] caucus of Ohio Congressmen December 28, to protest against Freed's appointment.

The First Transient, Christmas 1,938 Years Ago

Big problem facing Farm Security Administration is that of migrant agricultural workers in California. But for one day this week there will be no problem. Henry Wallace and Hollywood are banding together to wipe out the worries of migrant workers Saturday.

Hollywood big shots—including Eddie Cantor, Miriam Hopkins and Herbert Marshall—will stage a radio dramatization of the life of a transient, as it has not been presented since the First Transient family sought shelter 1,938 years ago. The scene will be as humble as the scene at Bethlehem. It will be the FSA camp at Shafter, California. Every child among Kern County's agricultural workers has been invited, many of them Mexicans and Negroes.

Some of the workers will take part with Hollywood stars in a series of sketches, and the children will take home bountiful Christmas stockings. Stars are contributing not only talent but funds. One star gave a fund raising party last week that netted $500.

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In the pre-Roosevelt days, guests used to line up in the state dining room and move east to pass the President. Now they gather in the East Room, and move west. Reason for the change is that pre-Rooseveltians didn't feed the guests, and the dining room was bare. Now, its tables are laden, and guests come to it only after they have been officially received.

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Dr. Robert M. Hutchins, Chicago University's youthful president and representative of the public on the Stock Exchange board, resigned because it would not crack down on J. P. Morgan, Thomas Lamont, E. H. Simmons and other Wall Street moguls involved in the Whitney mess. But this resignation was just the opening of the fight.

Hutchins demanded action on the SEC report after the Exchange rules had sidestepped it for two months. He argued that the Exchange could not apply the rod to small fry and pussyfoot on big shots if it wanted to convince the public it could govern itself and keep a clean house.

Douglas vs. Morgan

It is a sure bet that Douglas, chairman of SEC, will not muff the Hutchins pass. The Morgan group which balked Hutchins have been Douglas' bitterest foes in Wall Street, and he is not the kind to take anything lying down.

Until this incident, Douglas played ball with the 'reform' administration that came into Echange control last spring after the Whitney scandal.

[fol. 16] With the Exchange board backing away from punishing Whitney's colleagues, the next move will come from the SEC. It has the power to lay down Exchange regulations and that is exactly what it plans.

(Copyright, 1938, by United Feature Syndicate, Inc.)"

2. Plaintiff claims, and relies on as false and untrue, the following portions of the article:

Paragraph one (1) insofar as the plaintiff is concerned;

Paragraph three (3);

The first sentence of paragraph four (4) insofar as the plaintiff is concerned; and

Paragraph five (5).

As to the other statements in said article, plaintiff has no knowledge or information sufficient to form a belief as to their truth or falsity.

Dated, January 17, 1940.

DeGraff and Foy, Attorneys for Plaintiff, Office and Post Office Address, 11 North Pearl Street, Albany, New York.

To Charles G. Fryer, Esq., Attorney for Defendant, 243 State Street, Schenectady, New York.

(Verification.)

[fol. 17] IN UNITED STATES DISTRICT COURT

MOTION FOR JUDGMENT ON THE PLEADINGS

Take Notice, that on the complaint and on the answer of the defendant the undersigned will move this Court at a Special Term thereof to be held in the Federal Court Building in the City and County of Albany, N. Y., on the 21st day of September, 1940, at the opening of Court on said day or as soon thereafter as counsel can be heard for an order granting judgment dismissing the complaint, on the ground that said complaint does not state facts sufficient to constitute a cause of action, and for such other and further relief as to the Court may seem just and proper, together with the costs of this motion.

Dated, September 9th, 1940.

Charles G. Fryer, Attorney for Defendant, 243 State Street, Schenectady, N. Y.

To DeGraff & Foy, Attorneys for Plaintiff, 11 North Pearl Street, Albany, N. Y.

[fol. 18] IN UNITED STATES DISTRICT COURT

OPINION, COOPER, J.

DeGraff & Foy, Attorneys for Plaintiff, 11 North Pearl Street, Albany, N. Y.

Charles G. Fryer, Attorney for Defendant, 243 State Street, Schenectady, N. Y.

COOPER, J.:

This is a motion by the defendant to dismiss the complain-on the ground that the complaint does not state a cause of action against the defendant.

The action is for libel.

The complaint alleges that on December 23rd, 1938, issue of the defendant's newspaper "Schenectady Union-Star" published at Schenectady, N. Y., there was published the following alleged false, scandalous and defamatory libel:

"The Washington Merry-Go-Round (Trade Mark)

By Drew Pearson and Robert Allen

'Washington, Dec. 23rd: a hot-behind-the-scenes fight is raging in democratic congressional ranks over the effort of Father Coughlin to prevent the appointment of a Jewish Judge in Cleveland. The proposed appointee is Emerick Burt Freed, U. S. District Attorney in Cleveland and former law partner of Senator Bulkley, who is on the verge of being elevated to the U. S. District Court. This has aroused the violent opposition of Rep. Martin L. Sweeney, Democrat, of Cleveland, known as the chief Congressional spokesman of Father Coughlin. Basis of the Sweeney-Coughlin opposition is the fact that Freed is a Jew and one not born in the United States. Born in Hungary in 1897, Freed was [fol. 19] brought to the United States at the age of 13, was naturalized ten years later. Irate, Congressman Sweeney is endeavoring to call a caucus of Ohio Congressmen, December 28th to protest against Freed's appointment * * *.'

(Copyright, 1938 by United Features Syndicate Inc.)"

This action was commenced on December 13, 1939.

The complaint alleges that the plaintiff at the time of the publication was and still is a member of congress from the

State of Ohio, and has been such for over seven years; that he is an attorney at law in good standing and is a member of the bar in the State of Ohio.

The Complaint alleges no special damages.

The plaintiff's cause of action therefore rests upon the claim that the alleged libellous matter above set forth constitutes libel *per se*.

The answer is a general denial and also contains pleas in mitigation of damages; that the alleged libellous article is true and that the same constituted fair comment.

The part of the publication upon which plaintiff in his brief relies to support the charge that the publication is libellous *per se*, is confined to these words:

"Basis of the Sweeney-Coughlin opposition is the fact that Freed is a Jew, and one not born in the United States."

together with the statement that plaintiff's opposition was "violent" to which might be added that the word "irate" was also used as to the plaintiff's opposition.

Plaintiff contends that the libellous article should be interpreted as meaning that plaintiff was opposed to the appointment of Freed because the latter was a "foreign born Jew."

Plaintiff concedes that the quoted phrase might possibly mean that Sweeney's opposition was because Freed "is a Jew and a person not born in the United States" but says:

[fol. 20] "However, the grammatical construction of the sentence would seem to indicate that the former meaning was the one intended." (Viz. foreign born Jew.)

Accepting plaintiff's construction of the publication his claim is that the publication falsely charges him with violent opposition to the appointment of Freed as a U. S. District Judge because Freed is a foreign born Jew.

It is also to be noted that the alleged libellous article does not say, nor does it necessarily carry the inference, that plaintiff is prejudiced against and intolerant of Jews as such.

Asserting that the law of the State of New York is controlling here (citing Erie Railroad vs. Tompkins, 304 U. S. 64) plaintiff contends under New York law the publication is libellous *per se* and that decisions of other states cited by defendant are inapplicable.

There is no New York Statute defining civil libel and plaintiff cites New York decisions hereinafter mentioned to support the complaint as libellous *per se*.

These decisions hold that a written or printed article is libellous *per se* "if it tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right thinking persons and to deprive him of their friendly intercourse in society." Also "a publication is libellous *per se* where the tendency is to disgrace the plaintiff and bring him into ridicule and contempt."

Some or all of these definitions as to what constitutes libel *per se* are contained in all the New York cases cited by plaintiff.

In Sidney vs. McFadden N. P. Corp., 242 N. Y. 208, 212, the publication, among other things, stated that a well known married actress was the lady-love of a well known screen comedian of somewhat amorous disposition.

The dismissal of the complaint by the Trial Court on the ground that the publication was not libellous *per se*, was [fol. 21] affirmed by the Appellate Division by a divided Court and was reversed by the Court of Appeals by a vote of 4 to 2, Judge Cardoza not voting.

In Kimmerle vs. N. Y. Evening Journal, Inc., 262 N. Y. 99, the publication stated that an estimable rooming house proprietress was courted by a man who, it was charged, had murdered a former wife and had been convicted of the murder and that the rooming house keeper's confidence was won by a detective. The Court held the article not libellous *per se*.

In Bennett vs. Com. Adv. Assn., 230 N. Y. 125, various publications attacked the plaintiff, who was a Congressman. Among other things, one article said:

"Mr. Bennett is a disgrace to his constituency and to New York. He should be whipped out of public office by all decent men. He has sufficiently shown the sort he is. To be attorney for the food contractor and then as Congressman to serve that contractor—

"Congressman Bennett, who has been attorney for a food contractor at Ellis Island and who jockeyed through a rider to an appropriation bill that forbids Commissioner Howe to end the practice of giving a contractor a monopoly to make huge profits out of the food that arriving immi-

grants must buy of him, is smarting under exposure. Mr. Howe does not think it right that Bennett's former client should make large sums of money out of immigrants * * *. It is doubtful if Congressman Bennett is open to legal prosecution."

The Court said in holding the publication libellous *per se:*

"In view of what we have stated we trust it will clearly appear that an article may be libellous which does not charge a crime but makes accusations against a public official which show that he is unworthy of public trust and betrayer of civic confidence."

[fol. 22] In Dall vs. Time, Inc., 252 App. Div. 636, the publication there contained these words:

"Foreign News
France
Son-in-law

Yesterday————son-in-law of President———— shot himself in the White House in the presence of his estranged wife and Mrs.————(wife of the President). He died later in the day."

The above statements are in quotation marks.

Immediately thereafter was the following, which was not quoted:

"If such an event were so briefly reported in the U. S. Press, neither readers nor publishers would be satisfied. Yet almost an exact parallel of that tragedy occurred in the Hotel Continental, Department of Premier Gaston Domergue last week. Mention was limited to a few slender paragraphs in New York Newspapers and a close mouthed silence on the part of French officialdom."

Then followed another paragraph, also not quoted, which gave details of the suicide of the son-in-law of the French Prime Minister in the presence of the latter's wife.

There was no such suicide in the White House and defendant claimed that this was clear from the remainder of the publication. But abundant proof was given that many persons, including many customers of a commodity and brokerage house, believed that the suicide had actually taken place.

A verdict of a jury for no cause of action was set aside by the Trial Judge, whose decision was affirmed by the Appellate Division in a lengthly opinion holding that the publication was libellous *per se*. The decision was affirmed by the Court of Appeals without opinion. That Court said, "The question of whether the libel charged here is a libel as a matter of law is not before us."

[fol. 23] The only remaining case cited by plaintiff is Morey vs. Morning Journal Association, 123 N. Y. 207.

In that case publication was contained in a news paper of the City of Rochester, where the plaintiff, a married man of good reputation resided and was engaged in business:

"Refuses To Be Reconciled"

"A Rochester Society Belle who insists upon being married:

(Special to Morning Journal.)

Rochester, N. Y., Oct. 10th. Upper Tendom is highly excited over a threatened breach of promise suit against John E. Marcy, Jr., a stockholder of the Union and advertiser, and prominent in society circles. A prominent belle will be plaintiff in the action. Marcy and his friends are moving to effect a reconcilation, but the young lady insists upon his marrying her."

That such publication held the plaintiff up to public scorn and ridicule as one guilty of immorality, shameful and disgraceful conduct if not of crime, is manifest.

The foregoing are the New York cases upon which plaintiff relies.

It is clear that while these cases declare the law of this state as to what must be the effect or tendency of publications to constitute them libellous *per se*, none of the publications are at all like the publication here in suit.

Among the many cases cited by defendant are some from this state.

In Hills vs. Press Company, 122 Misc. 212, affirmed on opinion below in 212 A. D. 752, the complaint was dismissed as not libellous *per se*.

In Seelman on Libel and Slander, the following was said covering this case:

"Of a fuel administrator that he exercised favoritism as such, aiding certain dealers, refusing others, was unfair

[fol. 24] and inactive in work and in enforcing prosecutions was held not libellous * * * A publication to be libellous of a person must, or in case of a public officer, must touch him in his office and have a tendency to injure him therein by an accusation which shows him unworthy of public trust and a betrayer of public confidence * * *."

In Tanzer vs. Crowley Publishing Company, 240 App. Div. 202, a criticism of a former mayor more severe than here stated and bordering on a charge of unfitness for office was held not libellous *per se*.

In O'Connell vs. Press Publishing Co., 214 N. Y. 252 a publication stating that plaintiff invented a device which might be used for criminal purposes, that he showed it to a person in whose business it might be used and that it was so used for a criminal purpose, was held not to be libellous *per se*.

There is a slight distinction between a publication relating to a private citizen and one relating to a public officer. In a constitutional republic where freedom of speech and the press is guaranteed, comment on, or criticism of the political or official acts or views of a public officer is not libellous *per se*, merely because it hurts his feelings or distresses him.

Unless such published words impute immorality, violation of law, or charge expressly or by direct inference that he is corrupt, unworthy of public trust or a betrayer of civic confidence, or has been guilty of acts shameful and disgraceful in character, the publication is not libellous *per se*.

Tanzer vs. Crowley Pub. Co., 240 A. D. 203, *supra*.

Hills vs. Press Company, 122 Misc. 212, affirmed 212 A. D. 752, *supra*.

Gardner vs. Home Life Publishers, 237 App. Div. 200.

Hamilton vs. Eno, 81 N. Y. 116.

Grashley vs. Press Pub. Co., 74 App. Div. 118 affirmed 179 N. Y. 27.

[fol. 25] Briarcliffe Lodge Hotel Company vs. C. S. Publishers, *et al.*, 260 N. Y. 106, 118.

Defendant cites cases from various states to support its contention but no reference need be made to them as the law of libel varies in some of the states.

But a newspaper may not publish false statements regarding public officers if such statements are defam-tory.

Bingham vs. Gaynor, 203 N. Y. 27, 32.

The publication was not made concerning the plaintiff in his profession as a lawyer. It is not libellous in that respect if not relating to plaintiff in his profession.

Keene vs. Tribune Association, 76 Hun 488.

There have been decisions both ways in similar actions brought by this plaintiff against various newspapers based on this same publication or some variation or modification thereof.

The U. S. District Court of the Northern District of Illinois (Eastern Division) in an opinion handed down July 1, 1940, in an action by the same plaintiff against the Joliet Publishing Company held the publication there involved to be libellous *per se*.

It appears in that case, however, that the publication contained additional matter not contained in the publication here, which additional matters showed the superior fitness of the applicant for such appointment and that he was second on a list of five recommended by the Cleveland Bar Association and that all the others were eliminated for reasons stated.

It appears also that the laws of Illinois relating to criminal libel have been adopted by the Supreme Court of Illinois as the definition of libel in a civil action as well as criminal. The opinion so states and cites as authority:

Ogren vs. Rockford Star Publishing Company, 288 Ill. 405.

[fol. 26] No such rule obtains in this state.

Moreover, the opinion seems to be based on the ground that a charge that plaintiff is congressional spokesman for Father Coughlin, well known as bitter and vicious anti-Semitic and that joining with Father Coughlin in opposing the appointment of Freed "solely because he is a Jew certainly exposes plaintiff to public hatred, contempt and ridicule."

This case, therefore, is not in close analogy.

While there have been three ot' er decisions denying motions to dismiss the complaint, one in the same U. S. District Court in Illinois, one in the Eastern District of Wisconsin, and one in the Eastern District of Arkansas, whether the publication is like the one in Wisconsin or the one here does not appear, nor was any opinion written except a brief

memo in the other Illinois case based solely on association with Father Coughlin.

In one case in the State Courts of Ohio—Sweeney vs. Beacon Journal Publishing Company (Court of Common Pleas, Summit County), July 27, 1940, the Court held that the publication was not libellous *per se* and dismissed the complaint. The publication was presumably much like the publication here. In that case the Court said:

"There were and probably still are, many people who look upon Father Coughlin as a modern oracle and Messiah. There are many people who are opposed to placing people in office who are foreign born.

The Constitution of the United States will not permit a foreign born person to hold the office of President. The executive and judicial departments of the Government are equal and coordinate. How then can it be said to be unlawful to oppose the appointment of a foreign born person to the office of Judge.

There are a very large number of persons who are opposed to placing in public office persons whose religious faith is other than what is known as Protestant."

[fol. 27] In the publication here involved, there is, of course, no charge of crime, immorality, corruption in office or shameful personal conduct, which would induce an evil opinion of him in the minds of right thinking people.

Is there anything stated in the publication which would bring him into public ridicule, scorn or contempt.

The Federal Constitution forbids any foreign-born person from holding the office of President of the United States but there is no constitutional prohibition against a foreign-born citizen holding any other Federal office, though a certain number of years of citizenship is prescribed for Senators, Congressmen, and perhaps other Federal Officers.

It should be accepted as true that many people have prejudices of some kind. Prejudices relating to nationality and religion are quite common even in this country of constitutional right, liberty and equality.

The holding up of a person to ridicule, scorn or contempt, which makes a publication libellous *per se* is not that felt by co-religionists or co-nationalists, but ridicule, scorn or contempt of the general public or among right thinking people.

Opposition to such appointment of a foreign-born member of any foreign nationality could not fairly be said to have such effect or tendency. Nor could opposition to the appointment of a foreign-born member of any religion fairly be said to have such effect and tendency.

What is common knowledge, the Court must be deemed to know.

That there has long been prejudice in this country against the foreign-born who have come here must be accepted and especially so against such foreigners who aspire to public office.

The prejudice against foreign-born holding public office was once so great in this country that shortly after the middle of the last century a political party was formed to make sure that the government would rest only in the hands of native-born Americans. It was the "Native American [fol. 28] Party" popularly called the "Know Nothing party" because it was a secret order and the members professed to know nothing when questioned about it.

In the State elections of 1855 it carried most of New England, New York, Kentucky and California and gained some successes in other states. Thereafter it passed out of existence as an organization.

That was nearly a century ago but that feeling has continued to some extent to this day.

That there are such prejudices is greatly to be deplored. That there should be the fullest tolerance cannot be questioned.

There is without doubt some prejudice against the appointment of any foreign-born person, Jew or others, to judicial office despite the fact that there have been foreign-born Jews and others appointed to high judicial office who have served with ability and conspicuous fidelity to our country.

Though a man well fitted for judicial office should not be opposed because he is a foreign-born Jew, nevertheless a false statement that a Congressman who is also a lawyer opposed the appointment of a certain man on such ground, does not hold or tend to hold him up to public scorn, contempt or ridicule, and is not for any other reason libellous *per se*.

The motion to dismiss the complaint is granted.

Plaintiff may amend his complaint within twenty days.

January 8, 1941.

[fol. 29] IN UNITED STATES DISTRICT COURT

ORDER GRANTING MOTION TO DISMISS COMPLAINT

The defendant above named having duly moved for an order dismissing the complaint herein on the ground that it appears on the face of the complaint that said complaint fails to state facts sufficient to constitute a cause of action.

Now, on reading the complaint herein, and on reading and filing the notice of motion dated the 9th day of September, 1940, with proof of due service thereof, and after hearing Charles G. Fryer, attorney for the defendant in support of said motion and William F. Conway, of counsel for DeGraff and Foy, attorneys for the plaintiff, in opposition thereto, and due deliberation having been had, now on motion of Charles G. Fryer, attorney for the defendant it is,

Ordered that the said motion be and the same hereby is granted and that the complaint herein be dismissed on the ground that it appears on the face of the complaint, that said complaint fails to state facts sufficient to constitute a cause of action and that the defendant have judgment against the plaintiff dismissing the complaint with the costs of the action but with leave to the plaintiff to serve an amended complaint within twenty days after the date of the service of a copy of this order with notice of entry thereof upon the plaintiff's attorneys, and in which case the defendant is granted Ten dollars motion costs, and if the complaint is amended and the motion costs paid the costs of the action shall abide the result of the trial.

Frank Cooper, U. S. District Judge.

Dated, January 13th, 1941.

[fol. 30] IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF NEW YORK

JUDGMENT

The summons and complaint in the above-entitled action having been duly served upon the defendant December 13th, 1939, and the defendant having appeared by its attorney, Charles G. Fryer, and having served its answer herein on the 1st day of February, 1940, and the defendant

having moved for an order dismissing the complaint, by notice of motion dated the 9th day of September, 1940, upon the ground that it appears on the face of the complaint that said complaint fails to state facts sufficient to constitute a cause of action, and the motion having come on regularly to be heard before Hon. Frank Cooper, United States District Judge, at a Special Term of this court held in the City of Albany, N. Y., on the 21st day of September, 1940, and said motion having been granted by order dated the 13th day of January, 1941, and entered in the office of the Clerk of the United States District Court for the Northern District of New York at Utica, N. Y., on the 15th day of January, 1941, and a copy thereof having been duly served on DeGraff and Foy, Esqs., attorneys for the plaintiff on the 15th day of January, 1941.

And it appearing from the annexed affidavit of Charles G. Fryer, attorney for the defendant, verified the 11th day of February, 1941, that more than twenty days have expired since the service of said order and that the plaintiff has not served an amended complaint or paid the motion costs as provided by the terms of the said order.

Now, on Motion of Charles G. Fryer, attorney for the defendant it is,

Ordered, Adjudged and Decreed that the summons and complaint be and the same hereby are dismissed, and it is further

[fol. 31] Ordered, Adjudged and Decreed that the defendant recover of the plaintiff the sum of Twenty-eight and 50/100 dollars costs and disbursements of this action as taxed and that the defendant have execution therefor.

Frank Cooper, U. S. District Judge.

Dated, February 13th, 1941.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL

Notice is hereby given that Martin L. Sweeney, plaintiff above named, hereby appeals to the United States Circuit Court of Appeals, Second Circuit, from the order of the United States District Court for the Northern District of New York, dismissing the complaint of the plaintiff herein,

made the 13th day of January, 1941, and entered in the office of the Clerk of the said Court at Utica, New York, on the 15th day of January, 1941, and from the judgment entered thereon in the office of the Clerk of the said court at Utica, New York, on the 15th day of February, 1941.

Dated, Albany, New York, February 15, 1941.

DeGraff and Foy, by George W. Foy, Attorneys for Appellant, Office and P. O. Address, 11 North Pearl Street, Albany, New York.

[fol. 32] In United States District Court

Stipulation as to Record on Appeal

It Is Hereby Stipulated by and between the attorneys for the respective parties that the foregoing is a true and correct copy of the record on appeal herein. That the same contains all the proceedings and papers and may be filed as the record of appeal herein by the Clerk of the United States District Court for the Northern District of New York. It is further

Stipulated that the foregoing contains true and correct copies of the complaint, answer, bill of particulars, notice of motion for judgment on the pleadings, opinion and order of Cooper, J., judgment and notice of appeal and certification thereof by the Clerk of the United States District Court for the Northern District of New York, is hereby waived.

Dated, March 28, 1941.

DeGraff and Foy, Attorneys for Plaintiff-Appellant.
Charles G. Fryer, Attorney for Defendant-Appellee.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 33] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1940

No. 350

(Argued June 2, 1941. Decided July 18, 1941)

MARTIN L. SWEENEY, Plaintiff-Appellant,

against

SCHENECTADY UNION PUBLISHING COMPANY, Defendant-Appellee

Appeal from an order of the District Court for the Northern District of New York granting defendant's motion to dismiss the complaint in an action for libel on the ground that no cause of action was pleaded.

Before L. Hand, Chase and Clark, *Circuit Judges*

Charles G. Fryer, Attorney for Defendant-Appellee.
DeGraff and Foy, Attorneys for Plaintiff-Appellant; John O'Connor, William F. Conway, of Counsel.

[fol. 34] CHASE, *Circuit Judge:*

Jurisdiction in this suit for the libelous publication by the defendant of the statements concerning the plaintiff which will presently be set forth rests upon diversity; the plaintiff being a resident of Ohio and the defendant a New York corporation. The appeal is from an order dismissing the complaint on motion after the filing of an answer consisting of a general denial; special matter in mitigation of damages; and the truth of the matter printed coupled with the right to comment fairly thereon. No special damages were alleged and the question before us is whether the publication, which on this appeal must be taken for granted as having actually been made and having been false, was libelous *per se*. *O'Connell* v. *Press Publishing Co.*, 214 N. Y. 352; 108 N. E. 556.

The complaint alleged that the plaintiff, a representative in Congress from Ohio and a lawyer by profession, who was a member of the bar in good standing in the State of Ohio, had been "injured in his good name, fame and reputation,

in the conduct and execution of his official duties as a duly elected and chosen representative of the people of the State of Ohio in the Congress of the United States, in pursuance of his profession as a practicing attorney in good standing before the Bar in the State of Ohio, in his standing in the community wherein he resides, and in the high regard, respect, confidence and esteem he has hitherto enjoyed among his associates both in the Congress of the United States and in the legal fraternity and elsewhere" by the publication by the defendant in a newspaper called the "Schenectady Union Star" which is widely circulated and read "in the State of New York and the states of the United States and among the people thereof" of the following:

"A hot behind-the-scenes fight is raging in Democratic congressional ranks over the effort of Father Coughlin to [fol. 35] prevent the appointment of a Jewish judge in Cleveland.

"The proposed appointee is Emerich Burt Freed, U. S. District Attorney in Cleveland and former law partner of Senator Bulkley, who is on the verge of being elevated to the U. S. District Court.

"This has aroused the violent opposition of Representative Martin L. Sweeney, Democrat of Cleveland, known as the chief congressional spokesman of Father Coughlin.

"Basis of the Sweeney-Coughlin opposition is the fact that Freed is a Jew, and one not born in the United States. Born in Hungary in 1897, Freed was brought to the United States at the age of 13, was naturalized 10 years later.

"Irate, Representative Sweeney is endeavoring to call a caucus of Ohio Representatives December 28 to protest against his appointment."

The matter so published was received by the defendant for publication from an organization known as United Feature Syndicate, Inc. It was published in much the same form in many other newspapers in this country and the resulting libel suits brought in various courts by this plaintiff have been numerous. In some instances motions to dismiss the complaint on the ground that the publication was not libelous *per se* have been granted; in some such motions have been denied. Decisions in other jurisdictions, however, are not only conflicting but are for us inconclusive since they have turned on the application of the libel law

of states other than New York while here we must be governed by the law of the State of New York. *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64. We are not concerned, however, with any libel upon the plaintiff as a lawyer since no [fol. 36] reference was made in the publication to that profession of his. *Keene* v. *Tribune Association*, 76 Hun 488.

The false statements published concerning him neither separately nor together make him out to be a character more offensive to right-thinking people than he would be as the spokesman in Congress of Father Coughlin; who opposed the appointment of a man named Freed to the office of United States District Judge because Freed was a Jew and one not born in the United States; and who was angry about the matter to the point of attempting to have Ohio Congressmen protest in caucus against Freed's appointment.

But, all else aside, they do clearly attribute to him the desire and purpose to try to prevent the appointment of Freed to the office mentioned for the reason that Freed is a Jew who was foreign born. The context does not fairly permit reading the language as making the foreign birth of Freed the all sufficient cause of the plaintiff's opposition to his appointment but rather the contrary by stressing the fact that he was a Jew whose foreign birth apparently but gave an additional basis for plaintiff's opposition. And so the decisive question to be determined on this appeal is whether or not the publication of such false and unprivileged statements concerning the plaintiff within the last few years in the places as alleged in the complaint may be said as a matter of law not to have created any liability in the absence of special damages.

The New York law, as stated in *Kimmerle* v. *N. Y. Evening Journal, Inc.*, 262 N. Y. 99; 186 N. E. 217, makes libelous *per se* the publication of "words which tend to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation, or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society." To the same effect is *Sydney* v. *MacFadden Newspaper Pub. Corp.*, 242 [fol. 37] N. Y. 208; 151 N. E. 209. This is in general accord with the definition found in the Restatement of the Law of Torts. See § 559. The test is whether right-thinking persons would be reasonably expected to be induced by the

publication to believe that it truthfully represented the plaintiff's attitude on the subject of Freed's appointment and would be likely to regard him as a consequence in such a way that his reputation was injured in one or more of the respects above noted. It is, of course, not easy to apply this general test to a case of this nature. Opinions or prejudices concerning the matter in hand might well lead to different conclusions.

Some principles established in New York libel law are especially helpful in arriving at a just decision. One of them is that a false statement need not necessarily charge the violation of any law to be libelous *per se;* and another is that, when made of a public official, false accusations which may well lead right-thinking people to believe him unworthy of public trust and confidence are libelous *per se. Bennet* v. *Commercial Advertiser Ass'n,* 230 N. Y. 125. And still another is that an unprivileged, published falsehood need not make all, or even a majority of those who read it think the less of the person defamed. It is enough if a noticeable part of many who read it are made to hate, despise, scorn or be contemptuous of the person concerning whom the false statements have been published. *Peck* v. *Tribune Company,* 214 U. S. 195; Restatement, Torts, § 559(e).

And certainly the time and place of publication must be given due weight and effect. This plaintiff by being accused of trying to deprive a man of an appointment to public office because, presumably both in race and religion, he was Jewish would, intolerance being what it is, no doubt gain approval and increased respect in some quarters; and in others, where only the hit bird flutters, there would be indifference; but in a country still dedicated to religious and racial freedom decent, liberty-loving people still are present in great [fol. 38] numbers and still are greatly offended by the narrow-minded injustice of the bigots who see individuals only en masse and condemn them merely because their ancestors were of a certain race or they themselves are of a certain religion. Those who hate intolerance are prone to regard the person who believes in and practices acts of intolerance with aversion and contempt. And in these times when it is universal knowledge that one foreign dictator gained his power by practices which included large-scale, unreasonable Jewish persecutions which have played an important part in making his name an anathema in many parts of this coun-

try the publication of statements such as those alleged may well gain for the person falsely accused the scorn and contempt of the right-thinking in appreciable numbers. Freedom of speech is, as it always has been, freedom to tell the truth and comment fairly upon facts and not a license to spread damaging falsehoods in the guise of news gathering and its dissemination.

Moreover, in places where Jews make up a sizeable portion of the population, as they are known to do in part of the territory in which it is alleged that the defendant's newspaper circulated when the publication was made, it may be taken for granted that there will be an appreciable number who will hate or hold in contempt one who discriminates against a Jew merely because he is a Jew whether born in this country or not. A majority of the court is of the opinion that the complaint is sufficient under the principles above stated and that the defendant should be required to meet it on the merits.

Order reversed and cause remanded for trial.

CLARK, *Circuit Judge* (dissenting):

The decision herein seems to me not in accordance with New York law, where the right of comment on a public [fol. 39] official has been safeguarded in a practical way by "a somewhat different rule" than in ordinary cases and "a clear charge of corruption or gross incompetence holding one up to disgrace and contumely" is required; even an imputation of corrupt or dishonorable motives will be justified as fair comment if it is a reasonable inference from the facts. *Tanzer* v. *Crowley Pub. Corp.*, 240 App. Div. 203, 268 N. Y. S. 620, 622; *Gardner* v. *Home Life Publications, Inc.*, 237 App. Div. 200, 260 N. Y. S. 872, 874; *Hills* v. *Press Co.*, 122 Misc. 212, 202 N. Y. S. 678, 681, affirmed 214 App. Div. 752, 209 N. Y. S. 848. And so the cited cases hold not libelous *per se* comments on public officers more directly suggesting corrupt motives than does the one here—which charges rather bigotry and prejudice than corruption or impropriety in office. In the *Tanzer* case the comment attributed dishonorable motives to a mayor in his appointment of a city attorney; in the *Hills* case the comment charged special favoritism by a city fuel administrator to particular coal dealers and in the prosecution of cases. I think it clear that the charge must go to the extent of definite impropriety in office, as in *Bennet* v. *Commercial Ad-*

vertiser Ass'n, 230 N. Y. 125, 129 N. E. 343, but clearly not in the present case, before recovery can be had without proof of special damages.

Moreover, this view seems to be general, as shown by the fact that the majority of the many actions brought by this plaintiff against various newspapers based on this same article have been dismissed. Many cases were disposed of without reasoned opinions; of those where the matter is discussed, reference may be made to the persuasive reasoning of the Tennessee Supreme Court speaking through Chief Justice Green in *Sweeney* v. *Newspaper Printing Corp.*, 147 S. W. 2d 406, of Cavanah, *D. J.*, in *Sweeney* v. *Capital News Pub. Co.*, D. C. Idaho, 37 F. Supp. 355, of the Ohio Court of Appeals, affirming the dismissal below, in *Sweeney* v. *The Beacon Journal Publishing Co.*, 9th Dist., No. 3352, decided Feb. 27, 1941 appeal dismissed Ohio Sup., 34 N. E. [fol. 40] 2d 764, May 7, 1941 and of the district court in this case. Of such opinions to the contrary we find only two, both by the same district judge in the Northern District of Illinois, apparently unreported, and based upon an interpretation of Illinois law as limiting comment on public officers.

Not only does this seem to me, therefore, new law at least for New York State, but also definitely disturbing law. It would be a fine world to live in if only tolerance were so usual that a charge of the lack thereof against a public official could be so presumptively untrue that it would seem on its face unfair and libelous. But in our present world we must not take the naive view that what ought to be is, and that whoever suggests the contrary is a slanderer; for if we do so, we shut off all healthy criticism of prejudice, and allow bigotry full scope to act with impunity. Even more dangerous is the rationale of the decision that a comment leading an appreciable number of readers to hate or hold in contempt the public official commented on is libelous *per se*. Its broad sweep would take in comments found day after day in the most conservative newspapers, either in direct statement or as quotations of responsible critics, that a public official, particularly a legislator, is pro- or anti-labor, or pro- or anti-Nazi, or pro or anti this or that race, color, or creed. Minority comment on labor, religious and political views and activities of politicians becomes therefore hazardous. And the making of fine distinctions in rationale is indicated by the implication that a comment

suggesting plaintiff's objection to the judicial candidate for his foreign birth alone would have been proper. Of course, the uncertain threat of suit, invited by a rule at once so vague and so extensive, is a restriction on freedom of the press almost as direct as a rule of clear liability.

I do not think it an adequate answer to such a threat against public comment, which seems to me necessary if [fol. 41] democratic processes are to function, to say that it applies only to false statements. For this is comment and inference, as the *Tanzer* case suggests, and hence not a matter of explicit proof or disproof. The public official will always regard himself as not bigoted, and will so testify, sincerely enough. And then the burden of proving the truth of the defense will rest upon the commentator, who must sustain the burden of showing his inference true. If he fails in even a minority of the suits against him—as the sporting element in trials to juries susceptible to varying shades of local opinion would make probable—he is taught his lesson, and a serious brake upon free discussion established. But the common-law requirement of proof of special damages gives him the protection he needs, while at the same time it does prevent him from causing really serious injury and loss by false and unfair statements. That should be the rule applied here, as the district court held.

[fol. 60] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MARTIN L. SWEENEY, Appellant,

vs.

SCHENECTADY UNION PUBLISHING COMPANY, Appellee.

Before L. Hand, Chase and Clark, Circuit Judges

Charles G. Fryer for the appellee.

Per CURIAM:

Petition for rehearing denied.

L. H., H. B. C., C. JJ.

I dissent.

C. E. C., C. J.

Filed August 15, 1941.

[fol. 61] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of August, one thousand nine hundred and forty-one.

Present: Hon. Learned Hand, Hon. Harrie B. Chase, Hon. Charles E. Clark, Circuit Judges.

MARTIN L. SWEENEY, Plaintiff-Appellant,

vs.

SCHENECTADY UNION PUBLISHING Co., Defendant-Appellee.

A petition for a rehearing having been filed herein by counsel for the appellee, upon consideration thereof, it is Ordered that said petition be and hereby is denied.

D. E. Roberts.

[fol. 62] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Martin L. Sweeney v. Schenectady

Union Publishing Company. Order. United States Circuit Court of Appeals, Second Circuit. Filed Aug. 15, 1941. D. E. Roberts, Clerk.

[fol. 63] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 18th day of August, one thousand nine hundred and forty-one.

Present: Hon. Learned Hand, Hon. Harrie B. Chase, Hon. Charles E. Clark, Circuit Judges.

MARTIN L. SWEENEY, Plaintiff-Appellant,

vs.

SCHENECTADY UNION PUBLISHING CO., Defendant-Appellee.

Appeal from the District Court of the United States for the Northern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Northern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed with costs and cause remanded for trial. Further ordered that execution issue for the collection of said costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. Roberts, Clerk.

[fol. 64] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Martin L. Sweeney v. Schenectady Union Publishing Co. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Aug. 18, 1941. D. E. Roberts, Clerk.

[fol. 65] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 66] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 22, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration and decision of this application.

Endorsed on cover: File No. 46,073. U. S. Circuit Court of Appeals, Second Circuit. Term No. 745. The Schenectady Union Publishing Company, Petitioner, vs. Martin L. Sweeney. Petition for a writ of certiorari and exhibit thereto. Filed November 15, 1941. Term No. 745, O. T., 1941.

(8465)

In the United States Circuit Court of Appeals for the Second Circuit

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No. 350—October Term, 1940

MARTIN L. SWEENEY, PLAINTIFF-APPELLANT

against

SCHENECTADY UNION PUBLISHING COMPANY, DEFENDANT-APPELLEE

PETITION OF SCHENECTADY UNION PUBLISHING COMPANY FOR REHEARING

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Second Circuit:

On July 18, 1941, this Court (Judges L. Hand and Chase, Judge Clark dissenting) entered an order reversing an order of January 13, 1941, by District Judge Cooper, of the Northern District of New York, by which the complaint for libel of Martin L. Sweeney, an Ohio Congressman, against the Schenectady Union Publishing Company was dismissed upon motion for judgment on the pleadings. Although the jurisdiction of the Court below was denied in the Answer upon the ground that the matter in controversy did not exceed the sum of $3,000, neither the order appealed from nor the opinion accompanying the order made reference to the question of jurisdiction. By the order appealed from, the complaint was dismissed "on the ground that it appears on the face of the complaint, that said complaint fails to

state facts sufficient to constitute a cause of action." The opinion of the majority of this Court notes, in its first paragraph, that the appeal is from an order dismissing the complaint on motion after the filing of an answer consisting of a general denial, special matter in mitigation of damages, and the truth of the matter printed coupled with the right to comment fairly thereon. The question of the jurisdiction of the Court, except as indicated by diversity of citizenship is, however, not mentioned in the opinion of the majority of this Court.

It is respectfully suggested to this Court that in the exercise of the obligation placed upon it to satisfy itself of the existence of jurisdiction, whenever the question arises,[1] this Court should now find that it did not have jurisdiction of this cause.

The opinion of the majority of the judges sitting in this case appeared to Judge Clark to be

> "• • • not only • • • new law, at least for New York State, but definitely disturbing law."

It is of more than casual interest to note that it was in connection with a New York libel statute that the Supreme Court of the United States first went so far as to assume, though not at that time to decide, that freedom of the press is among the personal liberties which are guaranteed by the Federal Constitution against impairment by the States.[2] The extension of the constitutional guarantees to freedom of the press is now, of course, taken for granted,[3] but it could hardly fail to shock many students of constitutional law to find that this Court sitting in the State of New York, whose laws with respect to freedom of the press

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[1] *McNutt* v. *General Motors Acceptance Corporation*, 298 U. S. 178, 179, 80 L. ed. 1135, 1141.

[2] *Gitlow* v. *People of New York*, 268 U. S. 652, 69 L. ed. 1138 (argued April 12, 1923; reargued November 23, 1923; decided June 8, 1925).

[3] See *Lovell* v. *City of Griffin*, 303 U. S. 443, 82 L. ed. 949.

have been outstanding in their liberality, should be the Court to sound the note of warning against letting the press go too far in reporting and commenting on the acts of public officials who appear to the reporters and commentators to be motivated in some of their actions by prejudice against classes of persons within the United States. It could hardly fail to startle the advocates of the highest degree of personal liberty compatible with the public safety to find that this Court, long noted for the liberality of the views of its members, should be the Court to demand toleration for intolerance and to protect the prejudiced from the imputation of prejudice.

If the decision of the majority is to become the law of the State of New York with reference to libel actions brought by public officials against publishers printing comment of national circulation, imputing motives for lawful official actions which are unpopular with certain groups, the press will not dare to attempt to perform its vital function of comment and criticism and the breeders of discontent will flourish in darkness. If the majority view prevails, a political office-holder is immune to challenge for prejudiced and bigoted action, provided he avoids statutory violation and official corruption, because no group can, as a class, protect itself against even libelous comment;[4] and

[4] See *People* v. *Edmondson*, 4 N. Y. S. 2d, 257 (May 10, 1938), in which Judge Wallace, for the Court of General Sessions, New York County, dismissing an indictment for libel of "all persons of Jewish Religion", said: ". . . an indictment cannot be predicated upon defamatory writings assailing a class or group, unless directly, or by implication, some individual is libeled." • • • ". . . we must suffer the demagogue and the charlatan, in order to make certain that we do not limit or restrain the honest commentator on public affairs." • • • "The statute (N. Y. penal law, Sections 1340 and 1341, re libel) seems to imply that the gravamen of the crime is the harm done to the individual in his community." The Judge quoted from a writer in the *Columbia Law Review* for 1934, page 1344, the following statement:

> "While injury to reputation is the root of the *private* suit, the traditional basis of criminal prosecution for libel is its tendency to create a breach of the peace because of the *intense indignation arising from insult.*"

the general public may not be advised of the motives of a budding Goebbels because sensitive statesmen will be sustained by the Courts in their objections to intrusion upon their right to entertain such opinions as they wish.

The majority opinion neither implies nor suggests that in the present cause the plaintiff was the subject of a

> ". . . clear charge of corruption or gross incompetence holding one up to disgrace and contumely."[5]

It does not apply to this Ohio Congressman the "somewhat different rule" applicable in the case of public officials and in matters of public concern, although the facts reported and the context of the article taken with facts of common knowledge establish the qualified privilege of fair editorial comment.[6] Whereas the law of the State of New York with respect to criticism of one holding public office was heretofore that a published comment might be

> "• • • captious, ill-timed, and without foundation in fact • • •"[7]

the law of this case would leave no recourse or defense to a commentator expressing an opinion as to the motives of a public official, except on presumption of libel *per se*, that he must prove the truth of a charge of distorted intellectual processes usually not capable of explicit proof or disproof.

While the majority opinion is said to be restricted by the doctrine of *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, so that the decisions, diametrically contrary, of the Courts of last resort of Tennessee and Ohio, the residence of the Congressman, could not be considered although decided on this specific article contemporaneously, the ma-

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[5] *Tanzer* v. *Crowley Publishing Corp.*, 268 N. Y. S. 620, 622 (Supreme Court, Appellate Div., 4th Dept., January 24, 1934); not since modified.

[6] *Mattice* v. *Wilcox*, 147 N. Y. 624, 42 N. E. 270.

[7] *Tanzer* v. *Crowley*, *supra*.

jority depart from the accepted doctrine of the law of New York as laid down in numerous cases. In *Hills* v. *Press Co.*, for example,[8] it was held that to be libelous *per se* in the case of a public officer, a publication must

> ". . . touch him in his office and have a tendency to injure him therein by an accusation, which would show him unworthy of public trust and a *betrayer of civic confidence.*"[9]

Departing from the limitation to New York precedent, the majority of the judges sitting in this case state that the rule held applicable is in general accord with the definition found in the American Law Institute *Restatement of the Law of Torts*, citing Section 559 and 559(e). But, according to the introduction to this *Restatement*, in the approval of which one of the judges of the majority participated,

> "The object of the Institute in preparing the restatement is to present an orderly statement of the general common law of the United States, including in that term not only the law developed solely by judicial decision, but also the law that has grown from the application by the courts of statutes that have been generally enacted and have been in force for many years."

In zeal for the protection of freedom of speech and liberty of comment as to the motives of political characters, New York has not heretofore been exceeded by Tennessee, Ohio, or others of the several judisdictions in which State and Federal courts have found the present article to be not libelous *per se*. Nevertheless, applying the *Restatement*

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[8] *Hills* v. *Press Co.*, 202 N. Y. S. 678, 681, unanimously affirmed, Appellate Division, Third Department, May 26, 1925, 209 N. Y. S. 848

[9] The majority inaccurately stated this rule as applying, when made of a public official, to "false accusations which may well lead right-thinking people to believe him unworthy of public trust and confidence . . ." The majority cited *Bennett v. Commercial Advertiser Ass'n*, 230 N. Y. 125, decided in 1920, more than four years before *Hills* v. *Press Co.*, *supra*.

of the Law of Torts, publishers might have relied in New York heretofore upon the principles of privileged criticism of Sections 606 and 607 and, especially, upon the principle set forth in the following comment of the authors of the *Restatement,* under Section 607:

> "c. The concern which all citizens have in the proper conduct of public affairs by public officials requires that they have a wide freedom to discuss among themselves the public conduct of their officers and the qualifications of those who seek public office. Those who hold such offices and those who offer themselves as candidates therefor, by so doing subject their public acts to honest criticism even though it be extravagant and unjustified. To make the critic's protection depend not only upon the sincerity of his criticism but also upon its being such as a reasonable man might make would tend to prevent the public from knowing much essential criticism. The advantages gained by the freedom of discussion stated in this Section are therefore sufficient to outweigh the danger that the reputation of public officers or candidates may suffer thereby."

There is nothing in the majority opinion which would indicate that a false statement of opposition by Congressman Sweeney of Cleveland to the appointment of one or more individauls to public office could be regarded as libelous *per se.* The statement which the majority of the judges sitting in this case found to be libelous *per se* is in the first sentence of the fourth paragraph of the portion of the article specified in the bill of particulars, namely,

> "• • • Basis of the Sweeney-Coughlin opposition is the fact that Freed is a Jew and one not born in the United States."[10]

Neither the plaintiff nor the Court disputes the fact that Freed was a Jew or that Freed was foreign-born, but

[10] The bill of particulars limited the application of the first sentence of paragraph 4 by the words "insofar as plaintiff is concerned."

the court emphasizes the conceivably libelous character of attributing opposition to Freed's appointment to the fact that Freed was a Jew and foreign-born. It is the incorrectness of this attribution of motive which the court found

> "• • • within the last few years in the places alleged in the complaint to be libelous *per se* and in the absence of allegation of special damages."

As stated by the majority, the matter published was distributed by United Features Syndicate, Inc., to many other newspapers in this country and the resulting libel suits brought in various courts by this plaintiff have been numerous. The status of these suits is set forth in Appendix A. It will be observed by the Court that 36 of the 75 suits have been dismissed; 2 have been tried before juries, resulting in verdicts for defendants; 1, tried before a jury after denial of motion to dismiss, resulted in no verdict; and in 4 others a motion to dismiss was denied. The highest courts in the States of Ohio and Tennessee decided in favor of the defendants. All suits brought in these States and in the States of Kansas, Idaho, Florida, and South Carolina and in the District of Columbia, the residence of the authors of the allegedly libelous article and the place in which the plaintiff spends the greater part of his time, have been dismissed. All the cases decided in the States of Pennsylvania, Virginia, and West Virginia have been decided in favor of the defendants. The only case tried before a jury in New York resulted in a verdict for the defendants.

Apart from the possibility, which is not here discussed, that the principle of *res judicata* is applicable in the situation discussed by the foregoing statistics, it is respectfully urged upon the Court's attention that the importance of the decision in the case before the Court is greatly enhanced by the fact that more than thirty suits based on the identi-

cal article are still pending in various jurisdictions. The prestige of this Court in other jurisdictions cannot be unknown to the Court itself, and the responsibility of leadership is correspondingly great. It may be noted that the pendency of other suits involving the same question is one of the best recognized grounds for a rehearing by a Court of Appeals. 4 C. J. 629; 30 L. R. A. 620; *Morrow* v. *Weed*, 4 Iowa, 77, 66 Am. Dec. 122.

A further indication of the transcendent importance of the decision of the Court in this case, especially at such a time as the present, when it is particularly vital to preserve freedom of comment and of the press,[11] is the fact that the application of the principle of the majority opinion would require the courts to be prepared for innumerable suits against the publishers of the most conservative newspapers and other periodicals in which appear every day news items and comments not distinguishable in their general tenor from the publication which is before the Court in this case. For example, the New York Times on July 18, 1941, said of a speech by Secretary of the Interior Ickes that it "denounces Lindbergh as the 'knight of the German eagle' and a propagandist for the 'Nazi party line in this country'." Another New York newspaper, PM, on July 16, 1941, in a news story regarding Governor Talmadge of Georgia, commented: "At a time when Democracy is embattled everywhere the Governor is doing his best to undermine it by playing on bigotry and prejudice". PM added that "Talmadge was adapting racial theories of Naziism to his own subversive purposes". The Washington Post on April 24, 1941, reported that Governor O'Daniel of Texas "stands for some of the very things which make us hate the Nazis".

A sample collection of similar comments is attached as Appendix B.

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[11] *New Yorker Staats-Zeitung* v. *Brush*, 170 N. Y. S. 993.

Your petitioner now invites the further attention of the court to the question of jurisdiction raised at the beginning of the petition.

The complaint contains no allegation of special damage and neither the complaint nor the bill of particulars submitted by the plaintiff contains any details with respect to the damage alleged to have been suffered by the plaintiff, an Ohio Congressman, through the publication of the article in question by a newspaper of limited circulation in the State of New York. The only allegation of injury in the complaint is contained in paragraph 6 in which the plaintiff alleges injuries in his standing in the community *wherein he resides*. The allegations in the complaint, even if they be regarded as admitted upon motion for judgment on the pleadings, do not lay the foundation for proof of any injury which could possibly amount to as much as Three Thousand ($3,000.00) Dollars.

Since this cause comes before the court on appeal from a judgment on the pleadings, the court should, it is submitted, examine all the papers of record in the case with a view to determining whether there is any legal justification for the continuance of the litigation. It is generally recognized that the purpose of the new Federal Rules of Civil Procedure is to expedite (not to facilitate) litigation. To save litigants' time and expense, it is important for this Court to consider questions which may determine the controversy without the necessity for further procedure in the court below. Reference is made in this connection to the case of *Palmer* v. *Palmer*, 31 F. Supp. 861, reported in Clark's *Cases on Pleading and Procedure* (1940 ed.), page 930.

The courts have uniformly held that a mere allegation by the plaintiff that a sum involved exceeds Three Thousand ($3,000.00) Dollars and the mere claim of damages in excess of that amount are not conclusive to show that the

jurisdictional amount exists.[12] If an examination of the pleadings reveals that the amount of possible recovery in this case cannot, by any reasonable possibility, exceed Three Thousand ($3,000.00) Dollars, neither this Court nor the court below would have jurisdiction to proceed further with the case.

Your petitioner further invites the attention of the Court to the fact that but slight consideration has been given to the question of privilege raised by the pleadings. As has been indicated above, the effect of the opinion of the majority of this Court upon decisions in other pending suits and upon the currents of opinion throughout the United States in these times will be enormous. To omit consideration of the question of privilege might be to give the impression that that question was not deemed by the court to be pertinent or important in this case. Even if there were before the court no answer, setting up an unqualified privilege, it would still be appropriate for this Court to follow the practice which was followed in *Gardner* v. *Home Life Publications, Inc., supra,* in which the following statement was made:

> "• • • in reading and interpreting the article, we may consider facts of common knowledge, among which are that people are watching with great care and are desirous of being informed concerning all questions of taxation and the acts of public officials in relation to the fiscal affairs of a city • • •.
>
> "Reading the article in the light of its own language and the common knowledge of present municipal finances and the interest of the public therein, we look upon it as an item of news and do not place upon it the same interpretation as does the plaintiff, nor do we regard it as libelous *per se.*"

See also New York Code of Civil Procedure, chap. 547,

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[12] *McNutt* v. *General Motors Acceptance Corp., supra.*

as reported in Clark's *Cases on Pleading and Procedure* (1940 ed.) 907.

There is before the court, however, an answer in which the question of privilege is raised, and since a favorable determination of that question would terminate this litigation, and since that question does not appear to have been considered and passed upon by the court, it is earnestly suggested that an opportunity now be given for the consideration of that question upon a rehearing.

In view of the importance of the issues involved in this case, your petitioner respectfully requests that upon rehearing, the case be heard and considered by all the members of the Court. In the words of Judge Biggs, with the concurrence of Judges Mavis, Clark, Jones, and Goodrich on the point in question, in *Commissioner of Internal Revenue* v. *Textile Mills Securities Corporation,* 117 Fed. 2d, 62, 70:

> "A Court, as distinguished from a quorum of its members whom it may authorize to act in its name, cannot consist of less than the full number of its members. • • • Where • • • there is a difference in view among the judges upon a question of fundamental importance, and especially in a case where two of the three judges sitting in the case may have a view contrary to that of the other three judges of the Court, it is advisable that *the whole Court* have the opportunity, if it thinks it necessary, to hear and decide the question. Common sense and sound practice dictate that the five judges of this Court should be in a position to decide the principles of law and practice to which the Court is to be commited."

Conclusion

The ruling of the majority of the Court with respect to the applicable principles of the law of the State of New York is, it is respectfully submitted, contrary to well established precedents. It would dangerously restrict the freedom of the press, not only in the State of New York, but,

by reflection, in many other States in which the authority of this Court is highly regarded. The controversy between the parties can be concluded by a decision of the questions of jurisdiction and privilege in accordance with the views suggested in this petition. Since the majority opinion has failed to pass upon these questions, it is earnestly suggested that they be considered and determined by the entire Court upon rehearing.

Respectfully submitted,

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Of Counsel:
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Certificate of Counsel

Comes now WILLIAM A. ROBERTS, of Counsel for Schenectady Union Publishing Company, and certifies that he has read and knows the contents of the foregoing petition, and that said petition is filed in good faith and not for the purposes of delay.

WILLIAM A. ROBERTS,
Of Counsel.

Washington, D. C., August, 1941.

APPENDIX A—Status of Merry-Go-Round Suits

Cases Won and Dismissed

Arkansas

Dismissed May 7, 1941—Judge Lemley

Little Rock Arkansas Gazette	Sued December 21, 1939
Pine Bluff Commercial	Sued December 27, 1939

District of Columbia

Dismissed April 11, 1941—Judge O'Donoghue

Washington Times-Herald
Pearson and Allen

Florida

Dismissed February 10, 1941—by Sweeney's attorney

Jacksonville Times-Union	Sued December 22, 1939

Idaho

Dismissed March 5, 1941—Judge Cavanah

Boisé Capital News	Sued December 11, 1940

Illinois

Hung jury, January 17, 1941—Judge Holly

Chicago Herald-American

Kansas

Dismissed June 16, 1941—Judge Hopkins

Atchison Globe	Sued December 22, 1939
Concordia Blade-Empire	Sued December , 1939
El Dorado Times	" " " "
Garden City Telegram	" " " "
Great Bend Tribune	" " " "
Hutchinson Publishing Co.	" " " "
Junction City Daily Union	" " " "
Ottawa Herald	" " " "
Topeka State Journal	" December 22, 1939
Winfield Daily Courier	" December 24, 1939

New York

Jury Verdict for defendant—February 26, 1941—Judge Conger

United Features Syndicate

Dismissed January 8, 1941—Judge Cooper
Ruling for plaintiff July 18, 1941—Court of Appeals
Schenectady Union-Star Sued December 13, 1939

Ohio

Dismissed July 27, 1940—Judge Fritch
Dismissed February 27, 1941—Court of Appeals
Dismissed May 8, 1941—Supreme Court (34 N. E. 2d, 764)
Akron Beacon-Journal Sued December 14, 1939
Dismissed July 18, 1941
Columbus Dispatch
Dismissed May 3, 1941
Coshocton Tribune
Dismissed June 4, 1941
Dayton News
Dismissed June 10, 1941—Judge Lindsay
Dover Reporter Sued December 26, 1939
Dismissed May 19, 1941—Judge Fritch
Elyria Chronicle-Telegram
(No definite information)
Hamilton Journal-News Sued December 19, 1939
Irontown News
Dismissed June 10, 1941—Judge Lindsay
Urichsville Evening Chronicle

Pennsylvania

Dismissed May 8, 1941—Judge Fitzpatrick
Allentown Chronicle and News Sued December 21, 1939
Lancaster Intelligencer-Journal
Sued December 28, 1939
Philadelphia Record

South Carolina

Dismissed March 7, 1941—Judge Lumpkin
Greenwood Index-Journal Sued December 20, 1940

Tennessee

Dismissed April 29, 1941—Judge Darr
Chattanooga Free Press
Dismissed January —, 1941—Tennessee Supreme Court (147 S. W. 2d, 406).
Nashville Tennessean

Virginia

Dismissed June 17, 1941—Judge Way
Newport-News Daily Press
Dismissed June 30, 1941—Judge Way
Suffolk News-Herald Sued December 16, 1939
Dismissed September 3, 1940—Judge Barksdale
Martinsville Daily Bulletin Sued December 22, 1939

West Virginia

Jury Verdict January 11, 1941—Judge Watkins
Clarksburg Exponent Sued December 22, 1939

Other Cases

New York—Two cases pending.
Pennsylvania—Nine cases pending.
W. Va.—Two cases pending.
Virginia—Two cases pending.
Arkansas—One case, motion for dismissal denied.
Illinois—One case, motion for dismissal denied.
Arizona—One case, motion for dismissal denied.
Wisconsin—One case, motion for dismissal denied.
Mass.—Six cases pending.
Missouri—To cases pending.
Texas—One case pending.
Washington—One case pending.
Panama—One case pending.

APPENDIX B.

Excerpts from Recent Publications Which Would be Libelous under This Court's Decision

1. *New York Times*—May 26:

Alexander Woolcott: "Have you any doubt, any doubt at all, that Hitler would have been glad to pay Lindbergh an immense amount, millions, for the work that he has done in the last year?"

2. *New York Times*—April 14:

Ickes described Lindbergh as "the number one Nazi fellow traveller."

3. From *Look,* August 12th issue:

Under six pictures, with a general caption of:

"These are the Petty Fuehrers Who Need Lindbergh as Leader!"

are the following comments:

"Lindbergh renders highest possible service to every one of Fascist group. He gives American Fascism a moral base on which to operate."

"George Deatherage is a petty Fuehrer who knows how to makes speeches in the most patriotic accent."

"Lindbergh, wittingly or not, foments the hysteria on which such men feed."

"William Dudley Pelley, is a notorious Fascist. Recently Pelley named Lindbergh, Wheeler, and Mosely among 'the true leaders of a renovated, purged America'."

"Joseph McWilliams, a leader of New York anti-Semitic hoodlums, organizer of tacky, fly-by-night Fascist group, is typical of the rabble-rousers who only need a Fuehrer to lead them."

"Major-General George Vanhorn Mosely is the sort of agitator to fear—the one in clean clothes with well-kept nails. Fascism's Typhoid Marys are often respectability itself."

"Father Charles E. Coughlin, noted anti-Semite and pro-Fascist advocate of the Christian World—might become as powerful as Germany's Goebbels under a Fascist 'new' leadership."

4. From *New Republic,* July 28, 1941—Page 106

"It is common gossip in Washington that there is widespread anti-Semitism in the foreign service. Consuls in Europe who have repeatedly been charged with putting difficulties in the way of Jews seeking American visas are Leland B. Morris, of Berlin, and James B. Stewart, of Zurich."

5. From *PM*, July 20, 1941—Page 43

Referring to Governor Talmadge of Georgia:

"He is a loud mouthed narrow-minded fellow who has preached racial inequality and social inequality and who said in 1936: 'Hitler is a mighty fine man • • • ain't it so?'"

6. *Time* Magazine, September 16, 1940

Referring to Representative Sweeney of Ohio as a "Coughlinite."

7. From *New York Times*, May 27, 1936

Carries an AP dispatch stating "Mr. Sweeney has been one of the chief unofficial spokesmen in Ohio for Father Coughlin." Under the ruling of the Court of Appeals in New York, the *New York Times* and the AP both libeled Congressman Sweeney.

8. *PM*, April 25, 1941

Wrote of William R. Davis, the American oil man who had sold oil to Hitler "The British consider him a Nazi agent. • • • While Mr. Davis may not be, in a technical sense, a Nazi agent, he has been playing Hitler's game since 1933 and he still is at it. He has performed some valuable services for Hitler."

9. From *Herald-Tribune*, February 26, 1941

New York State Senator William J. Murray, who is a Democrat, charged that Justice Herbert O'Brien's views expressed at many public meetings at which he presided "tend to incite prejudice and religious hatred. • • • Judge O'Brien has been a consistent and conspicuous promoter of factionalism along racial and religious lines and is engaged in activities tending to incite riots.

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Supreme Court of the United States

October Term, 1941

No. 745

THE SCHENECTADY UNION PUBLISHING COMPANY

Petitioner

against

MARTIN L. SWEENEY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MORRIS L. ERNST
WILLIAM A. ROBERTS
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New York, N. Y.

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HARRIET F. PILPEL
EDGAR TURLINGTON

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Supreme Court of the United States

October Term, 1941

No. .....

THE SCHENECTADY UNION PUBLISHING COMPANY,
Petitioner,

against

MARTIN L. SWEENEY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Schenectady Union Publishing Company, defendant below, respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals herein (R. 59), rendered by a divided court, which reversed a judgment of the District Court for the Northern District of New York finally dismissing a complaint in libel on the ground that it failed to state a cause of action against petitioner (R. 30-31).

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (28 U. S. C., § 347 (a)). The decision of the Circuit Court of Appeals was rendered on

July 18, 1941 (R. 33); rehearing was denied on August 15, 1941 (R. 58).

Opinions of the Courts Below

The District Court, in holding that the complaint did not state a cause of action against the petitioner, wrote an opinion which is not officially reported but appears at R. 18. The prevailing opinion in the Circuit Court of Appeals, by Judge CHASE, and the dissenting opinion, by Judge CLARK, are reported in 122 F. (2d) 288 (R. 33-39). Judge CLARK likewise noted his dissent from the memorandum denial of the petition for rehearing (R. 58).

We shall also refer to opinions written by various State and Federal courts in other actions commenced by respondent based on the same or substantially the same publication.

Summary Statement of the Matters Involved

THE COMPLAINT

Respondent, Congressman Martin L. Sweeney, on December 13, 1939 instituted this action in the District Court for the Northern District of New York against petitioner, the publisher of the *Schenectady Union Star*, basing jurisdiction on diversity of citizenship and the existence of the requisite amount in controversy (R. 2).

The complaint is grounded upon the claim that the publication involved is libelous *per se*, since special damages are not alleged.

Respondent alleges in substance that he is a citizen of Ohio and that petitioner is a corporation organized under the laws of New York (R. 2); that respondent is a member of Congress from the State of Ohio (R. 3);* and

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* The complaint also makes reference to the fact that respondent is a lawyer, but both the District Court and the Circuit Court of Appeals exclude the claim that respondent was libeled in his profession as a lawyer since the publication does not refer to him in that capacity. Both opinions properly cite *Keene* v. *Tribune Assn.*, 76 Hun (N. Y.) 488, in support of this proposition (R. 25, 35).

that petitioner, "intending to • • • deprive [respondent] of the respect, confidence and esteem peculiarly essential to his • • • office," and "to hold [him] up to public scorn, contempt, ridicule and disgrace" (*id.*), on December 23, 1938 falsely published of respondent, under the title "Washington Daily Merry-Go-Round," the following matter (R. 4):

> "(A hot behind-the-scenes fight is raging in Democratic congressional ranks over the effort of Father Coughlin to prevent the appointment of a Jewish judge in Cleveland.)
>
> "The proposed appointee is Emerich Burt Freed, U. S. District Attorney in Cleveland and former law partner of Senator Bulkley, who is on the verge of being elevated to the U. S. District Court.
>
> "[This has aroused the violent opposition of Representative Martin L. Sweeney, Democrat of Cleveland, known as the chief congressional spokesman of Father Coughlin.]
>
> "(Basis of the Sweeney-Coughlin opposition is the fact that Freed is a Jew, and one not born in the United States.) Born in Hungary in 1897, Freed was brought to the United States at the age of 13, was naturalized 10 years later.
>
> "[Irate, Representative Sweeney is endeavoring to call a caucus of Ohio Representatives December 28 to protest against Freed's appointment.]"

By bill of particulars subsequently furnished, respondent set forth the whole of the column published by petitioner under the "by-line" of Drew Pearson and Robert Allen of which the above-quoted material formed a part (R. 13-15), and he also specified the sentences of the quoted material which he claimed to be untrue. The sentences enclosed in brackets were claimed to be untrue; the sentences enclosed in parentheses were claimed to be untrue only so far as respondent was concerned; and as to the rest, respondent disclaimed knowledge or information sufficient to form a belief of truth or falsity (see R. 16).

The gravamen of the complaint is stated thus, in the form of an innuendo (R. 4):

> "The foregoing was meant and intended to convey that plaintiff was and is guilty of un-American, racial prejudice against persons of Jewish origin and guilty of conduct unbecoming a public officer and to hold plaintiff in contempt in the eyes of his constituents * * *"

No items of special damage are alleged; the complaint merely concludes with a general claim of damages in the sum of $250,000 (R. 5).

Petitioner's Motion

Petitioner, after filing an answer containing denials and affirmative defenses (R. 5-12), on September 21, 1940 moved for judgment on the pleadings dismissing the complaint on the ground that it failed to state a cause of action (R. 17).

District Court Ruling and Opinion

The District Court by order dated January 13, 1941 granted petitioner's motion, allowing respondent twenty days to amend (R. 29).

In its opinion granting the motion, the court stated that "the alleged libelous article does not say, nor does it necessarily carry the inference, that plaintiff is prejudiced against and intolerant of Jews as such," since opposition to the nomination of Freed as Ohio District Judge on the ground that he was a Jew might well have been motivated by purely political considerations having no relation to bias or prejudice against Jews (R. 20, 26-28). But apparently content to consider *arguendo* that the publication might be construed as charging respondent with anti-Semitic beliefs, the court entered upon a discussion of the pertinent decisional law of New York on libel, recognizing

its duty to apply the law of New York solely (*Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64; R. 20).

While acknowledging that authorities cited by respondent contain formulary definitions of libel *per se*, as a general classification of the law of defamation, in terms of tendency "to expose the plaintiff to public contempt, ridicule, aversion or disgrace," etc. (R. 20), the court found that a special rule obtained in respect to writings concerning public officials, namely, that no accusation short of corruption or misconduct or impropriety in office can be libelous *per se*. To this effect authority in the Court of Appeals and the Appellate Divisions was cited (R. 21, 23-24). The court adverted to the place of such a rule in a country where freedom of speech and press is guaranteed (R. 24). Upon such analysis the court held the publication at bar to be not libelous *per se* and granted the motion to dismiss, but, recognizing that a false statement, although not libelous *per se*, remains actionable in New York if specific items of damage are pleaded and proved,* the court granted respondent leave to amend (R. 29). On respondent's failure to amend, the court entered final judgment in petitioner's favor (R. 30).

Majority Opinion in Circuit Court of Appeals

The majority opinion in the Circuit Court of Appeals, by Judge Chase, reversing the District Court and ruling that the publication is libelous *per se*, holds—contrary to the District Court, which merely assumed it *arguendo*—that the language of the article imputes anti-Semitic prejudice to respondent (R. 35).

In the body of his opinion Judge Chase cites only three New York cases.

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* *Al Raschid* v. *News Syndicate Co.*, 265 N. Y. 1, 4; *O'Connell* v. *Press Pub. Co.*, 214 N. Y. 352; *Husted* v. *Husted Co.*, 193 App. Div. 493.

He quotes from *Kimmerle* v. *New York Evening Journal, Inc.*, 262 N. Y. 99, 102, the formulary definition of words libelous *per se* as those which tend "to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation, or disgrace or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society"; and he says that *Sydney* v. *MacFadden Newspaper Pub. Corp.*, 242 N. Y. 208, is to the same effect.

Conceding that "It is, of course, not easy to apply the general test to a case of this nature," and that "Opinions or prejudices concerning the matter in hand might well lead to different conclusions" (R. 36), Judge CHASE proceeds to apply the formulary definition to the case in hand. He does not recognize any special rule as to public officials, and fails to cite the bulk of cases upon which the District Court rested enunciating that special rule. The only public official case cited by Judge CHASE is *Bennet* v. *Commercial Advertiser Assn.*, 230 N. Y. 125, and of this he says that "when made of a public official, false accusations which may well lead right-thinking people to believe him unworthy of public trust and confidence are libelous *per se*" (R. 36). (In fact the Court of Appeals in the *Bennet* case used quite different language,* and both the language and the facts of that case support the public official rule as above stated.)

The rest of the Judge's opinion is devoted to stating what appears to be the Judge's own view of the policy considerations involved without reference to the declarations of policy contained in New York cases.

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* The words just quoted from Judge CHASE's opinion are seemingly taken from the last paragraph of the *Bennet* opinion, but the precise language used by the Court of Appeals was "unworthy of public trust *and* a *betrayer* of civic confidence" (p. 132; italics ours).

DISSENTING OPINION IN CIRCUIT COURT OF APPEALS

In dissenting, Judge CLARK makes the following points:

1. The decision of the majority seems to him "not in accordance with New York law" (R. 37).

Judge CLARK rests upon the *Bennet* case in the Court of Appeals and the decisions of the Appellate Divisions in *Tanzer* v. *Crowley Pub. Corp.*, 240 App. Div. 203, *Gardner* v. *Home Life Pub., Inc.*, 237 App. Div. 200, and *Hills* v. *Press Co.*, 122 Misc. 212, *aff'd*, 214 App. Div. 752, in support of the special New York rule applicable to public officials (R. 37-38).

2. This view of the law seems general, as shown by the prevailing results in the seventy-five actions (R. 47) brought by respondent in other jurisdictions throughout the country based on the same or substantially the same publication. Judge CLARK calls particular attention to the opinions in *Sweeney* v. *Newspaper Printing Corp.*, 177 Tenn. 197 (per GREEN, *C. J.*); *Sweeney* v. *Capital News Pub. Co.*, 37 F. Supp. 355 (D. C. Ida.), and *Sweeney* v. *The Beacon Journal Pub. Co.*, 66 Ohio App. 475, *app. dism.*, 138 Ohio St. 330. (Since the present decision, Judge ALLRED, in the United States District Court in Texas, has dismissed a complaint, filing a comprehensive opinion which takes sharp issue with the reasoning of the majority herein. *Sweeney* v. *Caller-Times Pub. Co.*, ... F. Supp. ....., S. D., C. A. No. 62, Aug. 21, 1941.)

3. The "new law at least for New York State" created by the majority decision is "definitely disturbing law" (R. 38). The considerations which render it disturbing are the following (R. 38-39):

> "• • • It would be a fine world to live in if only tolerance were so usual that a charge of the lack thereof against a public official could be so presumptively

untrue that it would seem on its face unfair and libelous. But in our present world we must not take the naive view that what ought to be is, and that whoever suggests the contrary is a slanderer; for if we do so, we shut off all healthy criticism of prejudice, and allow bigotry full scope to act with impunity. Even more dangerous is the rationale of the decision that a comment leading an appreciable number of readers to hate or hold in contempt the public official commented on is libelous *per se*. Its broad sweep would take in comments found day after day in the most conservative newspapers, either in direct statement or as quotations of responsible critics, that a public official, particularly a legislator, is pro- or anti-labor, or pro- or anti-Nazi, or pro or anti this or that race, color, or creed. Minority comment on labor, religious and political views and activities of politicians becomes therefore hazardous. And the making of fine distinctions in rationale is indicated by the implication that a comment suggesting plaintiff's objection to the judicial candidate for his foreign birth alone would have been proper. Of course, the uncertain threat of suit, invited by a rule at once so vague and so extensive, is a restriction on freedom of the press almost as direct as a rule of clear liability.

"I do not think it an adequate answer to such a threat against public comment, which seems to me necessary if democratic processes are to function, to say that it applies only to false statements. For this is comment and inference, as the *Tanzer* case suggests, and hence not a matter of explicit proof or disproof. The public official will always regard himself as not bigoted, and will so testify, sincerely enough. And then the burden of proving the truth of the defense will rest upon the commentator, who must sustain the burden of showing his inference true. If he fails in even a minority of the suits against him—as the sporting element in trials to juries susceptible to varying shades of local opinion would make probable—he is taught his lesson, and a serious brake upon free discussion established. But the common-law requirement of proof of special damages gives him the

protection he needs, while at the same time it does prevent him from causing really serious injury and loss by false and unfair statements. That should be the rule applied here, as the district court held."

Specification of Error

The Circuit Court of Appeals erred in reversing the judgment of the District Court and in failing to affirm the same.

Questions Presented

1. In holding the publication complained of to be libelous *per se*, did the Circuit Court of Appeals go counter to applicable New York authorities establishing a special libel rule in the field of public officials? Assuming without conceding that applicable New York law is not altogether clear on the point, did the Circuit Court of Appeals, in creating "new law," go counter to declared policy of the State?

2. Did the Circuit Court of Appeals follow or did it violate the rules for ascertaining State law pronounced by this Court since its decision in *Erie Railroad Co.* v. *Tompkins*? In this connection, was the majority right in wholly ignoring the pertinent decisions of State courts of intermediate appeal as well as the declared policy of the State?

3. Is the judge-made rule of law established by the judgment under review compatible with the State and Federal constitutional guaranties of a free press and due process of law?

Statute and Constitutional Provisions Involved

The Rules of Decision Act (Judiciary Act of 1789, c. 20, § 34, 28 U. S. C., § 725) provides:

"The laws of the several States, except where the Constitution, treaties, or statutes of the United States

otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

The Constitution of the State of New York, Article I, Section 8, guarantees a free press, and Article I, Section 6 thereof contains a "due process" clause. In addition, the First, Fifth and Fourteenth Amendments to the Constitution of the United States are deemed pertinent.

Reasons Relied on for Allowance of the Writ

I. The Circuit Court of Appeals has decided an important question of New York law in conflict with applicable local decisions.

1. Question of Local Law Involved

The Circuit Court of Appeals construed the statement that Congressman Sweeney opposed the nomination of Freed as Ohio District Judge on the ground that Freed was "a Jew, and one not born in the United States," as tantamount to a charge that the Congressman was prejudiced against Jews or at least foreign-born Jews.

This construction is open to very considerable doubt, as the District Court (R. 20, 27-8) and several other courts passing on substantially the same publication have pointed out. See opinions *supra*, p. 7. The fact that a man opposes the appointment of a particular person to a public office on the ground that the candidate is a member of a given racial or religious group does not at all indicate that he is prejudiced against that group: among other things, he may believe that it is wise, in making political appointments, to consider and give weight to the groupings, racial and religious as well as economic and geographical, in the community. We venture to say that there are few people who have not given consideration to such factors in the matter of political appointments, with-

out thereby exhibiting bigotry or prejudice, or at least more than the touch of prejudice that is ineradicable from even the best of human minds. The notion that merit alone should dictate political appointments and that anyone who thinks otherwise on any particular occasion is a bigot, is, indeed, neatly contradicted by a review of the qualifications which Congress has itself established by statute through the years for the holding of various Federal offices. See the collation of instances in the dissenting opinion of Mr. Justice BRANDEIS in *Myers* v. *United States*, 272 U. S. 52, 240.

Although the court's interpretation of the article is, therefore, more than questionable, we are nevertheless assuming that it was correct. The issue of law was, accordingly, whether the gravest sanction of the libel law—liability without proof of special damage—should attach to a writing concerning a public official, in respect to a matter of public interest, which, while not imputing to him incompetence or impropriety in office, incorrectly asserts that he entertains an opinion * which is deemed a bigoted or prejudiced opinion by an appreciable number of respectable members of the public. That question was answered in the affirmative by a majority of the court, and with no expressed limitation on the broad sweep of the doctrine enunciated.

The scope and importance of the decision will be considered more fully below; here we need only say with Judge CLARK that the rationale of the decision "would take in comments found day after day in the most conservative newspapers, either in direct statement or as

* For purposes of the applicable New York law hereinafter discussed, we need not mark a distinction between "act" and "opinion." Correct appraisal of the case will be assisted, however, by noting that there was nothing improper in merely opposing Freed for District Judge and there would be nothing libelous in the charge that the Congressman had done so; the sting of the alleged libel, if any, resided in the implication that he had done so because he held a certain bigoted opinion.

quotations of responsible critics, that a public official, particularly a legislator, is pro- or anti-labor or pro- or anti-Nazi or pro or anti this or that race, color, or creed. Minority comment on labor, religious and political views and activities of politicians becomes therefore hazardous" (R. 38). *

2. Majority's Superficial Analysis of New York Law

The majority of the court rested its decision on three New York cases. Two of these—the *Kimmerle* (262 N. Y. 99) and *Sydney* (242 N. Y. 208) cases—contain a general directional "definition" of the entire concept of libel *per se* in terms of tendency to expose the plaintiff to "ridicule and contempt." The majority makes no effort to analyze the *facts* of these cases, which are actually as far removed from the facts of the present case as can be imagined. † Nor is there a suggestion that the "definition" has in the process of judicial decision yielded to more specific and different formulations in terms of the identity of the plaintiff and the occasion and type of utterance involved.

It is plain that the "definition," which is the barest directional indication of the content of a great, diversified

* In *Sweeney* v. *Caller-Times Pub. Co.*, decided by Judge Allred on August 21, 1941, the publication sued on contained two paragraphs which were cut out of the "Merry-Go-Round" column as it appeared in petitioner's newspaper. These paragraphs stated that there were other persons on the Bar Association's preferred list; one had eliminated himself for physical reasons; two were eliminated by Justice Department officials "because of big business or reactionary connections"; one was eliminated because he was "a Catholic and the last two judicial appointments in Ohio have been Catholics." So the Department turned to Freed. Was this a libel on officials of the Justice Department? Or on the persons accused of reactionary connections? It would seem so, under the decision herein.

† The *Kimmerle* case involved slurs cast upon the proprietor of a rooming house who had allegedly become friendly with a self-confessed wife-murderer; held, no libel. The *Sydney* case concerned imputations on the chastity of a married woman referred to by the defendant as Fatty Arbuckle's latest lady love.

branch of the law of torts, affords scant if any guide to the decision of a particular case. This is indeed recognized in the *Kimmerle* opinion (at p. 102). Many statements in fact exposing persons to ridicule and contempt are not actionable *per se*, and *e contra*, many statements not in fact exposing persons to ridicule and contempt are nevertheless actionable *per se*. See *Rose* v. *Daily Mirror, Inc.*, 284 N. Y. 335; *Lamberti* v. *Sun Printing Assn.*, 111 App. Div. 437; *Cohen* v. *New York Times Co.*, 153 App. Div. 242; *Sunderlin* v. *Bradstreet*, 46 N. Y. 188; *cf.* L. HAND, *C. J.*, in *Burton* v. *Crowell Pub. Co.*, 82 F. (2d) 154 (C. C. A. 2). The "definition" takes on real meaning only when the holdings of the cases are analyzed and classified.

So analyzed and classified, the cases yield a special rule respecting *comment on public officials* which flatly covers the present situation. The majority ignores this rule: it refers to but one case involving a public official, the *Bennet* case (230 N. Y. 125), and even so fails to mention its facts and misstates the language of the Court of Appeals.

We urge that the superficial examination of New York law disclosed in the majority opinion, ignoring the public official rule, has resulted in a decision "not in accordance with the law of New York."

3. PUBLIC OFFICIAL RULE IN NEW YORK

Judge CLARK correctly says that in New York

> "the right of comment on a public official has been safeguarded in a practical way by 'a somewhat different rule' than in ordinary cases and 'a clear charge of corruption or gross incompetence holding one up to disgrace and contumely' is required"

before a statement concerning a public official will be held libelous *per se* (R. 37).

In support of this formulation of the public official rule Judge CLARK discusses and cites the cases of *Bennet*, *Tanzer* (240 App. Div. 203), *Gardner* (237 App. Div. 200) and *Hills* (122 Misc. 212, *aff'd*, 214 App. Div. 752), which are also cited and discussed in the opinion of the District Court. The effect of these decisions is given in the *Tanzer* case, *supra* (p. 205):

> "One who holds public office must expect criticism. It may be captious, ill-timed and without foundation in fact, but, outside of a clear charge of corruption or gross incompetence holding one up to disgrace and contumely, there is no libel."

As noted in the minority opinion, the same view obtains in other jurisdictions in which respondent has commenced suit (R. 38).

Restated, the rule is that, while it is a condition precedent to presumptive liability for statements concerning public officials that they shall have the *effect* of injuring reputation through exposure to odium in the minds of readers, that alone is not sufficient; this effect must have *come about through a particular kind of imputation*, namely, an imputation of corruption or gross incompetence; else there is no libel *per se*. By reference to this rule the publication at bar is clearly not libelous *per se*. The majority does not claim the opposite; it simply ignores the existence of the rule.

The public official rule derives from the declared policy of the courts of New York that the area of permissible expression should be much broader in the case of public officials than in the case of private citizens. Declarations to that effect are uniform and multitudinous. See *Hoeppner* v. *Dunkirk Printing Co.*, 227 App. Div. 130, 133-4, *aff'd*, 254 N. Y. 95; *Cortright* v. *Anderson*, 208 App. Div. 1, 4; *Howarth* v. *Barlow*, 113 App. Div. 510, 513. This policy is based on the supposition that the interest of the public official in his personal comfort is not absolute and must

on occasion yield to the larger interest in free, even if intemperate, discussion of official behavior and opinion; that persons who are thin-skinned usually have the choice of avoiding abuse by declining to enter the public arena through accepting public office; and that officials, protected as they are by certain extraordinary immunities from liability for their own utterances,* and usually enjoying readier access to the press than other people, have effective weapons of self-defense against false attacks other than resort to lawsuits. These things argue for a limitation as to public officials of the area of libel *per se;* but New York accords the same remedy to public officials as to private citizens in cases where actual injury can be shown, in the form of an action for special damages.

4. Cases Involving "a Clear Charge of Corruption or Gross Incompetence"

The majority refers to the *Bennett* case as holding that "when made of a public official, false accusations which may well lead right-thinking people to believe him unworthy of public trust and confidence are libelous *per se*" (R. 36). If such were the test, virtually every statement made in the course of a political campaign or in partisan editorial comment would be libelous *per se,* since it is always the purpose of one side to show that the other is "unworthy of public trust and confidence." Actually the Court of Appeals, in the part of its opinion which the majority was seemingly restating, used the words "unworthy of public trust *and* a *betrayer* of civic confidence" (p. 132); and in another portion of the opinion the court said that the plaintiff was charged with "serving the financial interests of a former client by the *betrayal* of his public duties" (p. 130).

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* Respondent, with absolute immunity for utterances on the floor of Congress, has made speeches in Congress about the present litigation. 87 Cong. Rec., p. A4039 (Aug. 6, 1941); 84 *id.*, p. 8694 (May 25, 1939). These speeches could be franked into New York without accountability for libel. N. Y. C. P. A., § 337.

The present case does not involve a charge of "betrayal," nor did the majority of the court below say that it did. But in any event the language of the Court of Appeals must be read in the light of the facts. Bennet, an attorney and a member of Congress, was accused of acting as a cheat by slipping a "joker" into a bill, against the public interest and in order to create huge unwarranted profits for his client. Thus Bennet was accused of an underhanded act involving corruption in office. Judge CLARK correctly states that the *Bennet* case involved a charge of "definite impropriety in office" (R. 37), and the case is within the ambit of the special rule upon which he relies.

And similarly we find that the other cases in New York holding statements critical of public officials to be libelous *per se* involved charges of gross incompetence or accusations of corrupt conduct—impropriety in office.

Hamilton v. *Eno*, 81 N. Y. 116: Plaintiff was accused of having made certain recommendations as to pavement out of a motive of personal profit.

Bingham v. *Gaynor*, 203 N. Y. 27: Plaintiff was accused of corruption, incompetence, scoundrelism, and lawlessness.

Powers v. *Dubois*, 17 Wend. (N. Y.) 63: Plaintiff was accused of being out to defeat a great public improvement "with a view to his own particular advantage, to the serious injury of the public interests."

Weed v. *Foster*, 11 Barb. (N. Y.) 203: Plaintiff was charged with accepting $5,000 for procuring the Governor to make an appointment.

Hoey v. *New York Times Co.*, 138 App. Div. 149: Held, that the jury should have decided whether the publication charged that plaintiff, in voting a certain way on a bill, "was corruptly and improp-

erly influenced by a desire to aid and assist the league, to which reference is made, and which, if it exists, must have been founded upon bribery and corruption."

Lunn v. *Littauer,* 187 App. Div. 808: Plaintiff was accused during the World War of "being the agent of selfish and designing business men, seeking to gain 'big money' through his supposed influence in procuring shipping for their own products in disregard of the rights of the nation."

Burnham v. *Hornaday,* 130 Misc. 207, *aff'd and mod.,* 223 App. Div. 218: Plaintiff's official acts were said to be swayed and determined by the profits which he obtained in private employment.

5. Cases Involving Less Than "a Clear Charge of Corruption or Gross Incompetence"

On the other hand, as Judge Clark says, New York cases "hold not libelous *per se* comments on public officers more directly suggesting corrupt motives than does the one here—which charges rather bigotry and prejudice than corruption or impropriety in office" (R. 37).

Duffy v. *New York Evening Post Co.,* 109 App. Div. 471: Plaintiff, a Republican of standing, was said to be "Absolutely devoid of any knowledge of the customs of polite men. Does well in business, especially during Tammany regimes. Devotes his time and energy more to assisting the Tammany leaders than to working for his own nominal party. Is reported to be about to join Tammany openly soon. Apparently knows no more of and cares no more for political principles than he does of the silurian age in geology. Mixes in Tammany factional fights, to the detriment of the Republican Party. A most unworthy choice."

Tanzer v. *Crowley Pub. Corp., supra*: Plaintiff was charged with appointing a city attorney to protect a client of the attorney who had filed hand-picked assessment rolls.

Hills v. *Press Co., supra*: Plaintiff was accused of favoritism and unfairness and inactivity in office.

Gardner v. *Home Life Pub., Inc., supra*: Plaintiff was accused of having announced the city's finances were sound the day before a huge deficit was announced.

It may be added that in the class of cases just cited, the publications were principally critical of the *acts* of public officials. In the case at bar the larger if not the whole emphasis of respondent's case is on the imputation of unpopular *belief or attitude.* Although unnecessary to the decision herein, the proposition is accepted in New York that imputation of belief or attitude is not actionable *per se,* even when made of a private citizen. *Cf. Flanagan* v. *McDermott Dairy Co.,* 132 App. Div. 166; *Cook* v. *Mirsky,* 252 App. Div. 496, *aff'd,* 278 N. Y. 524. And this is the rule probably prevailing generally. See *Rutherford* v. *Dougherty,* 91 F. (2d) 707 (C. C. A. 3) ("we cannot say that to state the plaintiff's address foments religious hatred and bigotry is libelous"); *Sullivan* v. *Meyer,* 91 F. (2d) 301 (C. A. D. C.) (a strong criticism of plaintiff's stand concerning the teaching of radical doctrine in public schools, held not libelous *per se*); *Snavely* v. *Booth,* 36 Del. 378 ("We have been referred to no authority, nor have we been able, in an extended search, to find authority, holding that criticism of mere opinion or theory is actionable defamation.").

6. "New Law" Established by Majority

Apart from definite conflict with New York authority, it is certainly clear that the decision below establishes

"new law" (R. 38) which is contradicted by actual practice. In the petition for rehearing a random collection of statements was culled from the issues of newspapers and magazines (R. 55-57), each one of which would be libelous *per se* under the rule announced below. We suggest that no issue of any newspaper, even the most dignified and cautious, is free of such statements: officials are constantly charged with entertaining unpopular views—that is one of the most familiar techniques of public debate. If the rule is as announced below, an enormous area of expression on matters of general concern is suddenly overhung with the threat of presumptive liability.

The law declared by the court below is new law, repugnant to the *mores* of the times as evidenced on every hand. Whether the Circuit Court of Appeals was right in creating it out of the vague implications of a general "definition" raises a question of such importance to democratic processes that, we submit, review by this Court is warranted even apart from that direct conflict with the holdings of New York cases which has already been demonstrated.

II. The Circuit Court of Appeals has failed to apply the Rules of Decision Act in accordance with the principles established by this Court or in consonance with its underlying policy.

Not only in objective result, but also in method and approach, the majority of the Circuit Court of Appeals has failed to comply with the Rules of Decision Act as that Act has recently been construed by this Court. In reality the intent and purpose of the Act have been violated, with the result that the "accident of diversity of citizenship" will, if the decision below is allowed to stand uncorrected, "disturb equal administration of justice in co-ordinate state and federal courts sitting side by side." *Klaxon Co.* v. *Stentor Mfg. Co.*, 313 U. S. ....., ..., 85 L. Ed. 969, 971.

1. The majority purports to follow authority in the New York Court of Appeals, but as we have seen, it merely rehearses a form of words contained in those cases which affords scant if any realistic guide to decision. The true effect of the holdings of the cases in the Court of Appeals as well as in courts of intermediate appeal has been disregarded.

Reliance upon general language in State cases, without adequate appraisal of the true effect of the holdings, obviously may be, and in the present instance clearly is, tantamount to a refusal or failure to follow State law in the sense required by the Rules of Decision Act. Compare the technique employed by this Court in finding State law in *Texarkana* v. *Arkansas L. Gas Co.*, 306 U. S. 188. The present case affords opportunity for admonition to Federal courts that compliance with the Act involves more than a protestation that State law is being applied, concealing under a gloss of words the substitution of the judgment of the Federal courts for the judgment of the State courts.

2. It might possibly be claimed—although erroneously, as we contend—that the highest State court has not directly passed upon the point in issue. The majority of the Circuit Court of Appeals has certainly suggested no *firmer* foundation for its ruling than this: for, while citing three cases in the New York Court of Appeals, it frankly admits of a doubt whether the publication at bar should be held libelous *per se* (R. 36).

Under such circumstances the majority was obliged to look for guidance to pertinent decisions of the Appellate Divisions, the courts of intermediate appeal. It failed to do so.

We recognize, of course, that the majority may have deliberated upon the cases in the Appellate Divisions although it omitted to cite or discuss a single one of them. Our argument is not addressed to the mere failure to cite

cases. We say that decisions of the Appellate Divisions which the majority ignores in its opinion are either conclusive authority in petitioner's favor (as the District Court and the dissenting Judge appear to have believed, see R. 23-25, 37) or are at least so far relevant and persuasive that the majority's omission to consider them in its opinion proves that it has done less than its full duty in finding and applying local law.

This Court has recently stressed the importance, if not the constitutional necessity (*cf.* BRANDEIS, *J.* in *Erie Railroad Co.* v. *Tompkins. supra,* pp. 78-80), of applying the pertinent decisions of State courts of intermediate appeal where the highest court of the State has not spoken or has spoken with an ambiguous or inconclusive voice. We need not do more than recall to the Court its holdings in *West* v. *American Tel. & Tel. Co.,* 311 U. S. 223; *Stoner* v. *New York Life Ins. Co.,* 311 U. S. 464; *Six Companies* v. *Joint Highway District,* 311 U. S. 180; *Fidelity Union T. Co.* v. *Field,* 311 U. S. 169; see *Russell* v. *Todd,* 309 U. S. 280, 293.

3. Even if the judgment under review is not in definite conflict with the decisions of the New York Court of Appeals or of State intermediate courts, it certainly establishes a new class of statements libelous *per se* which were not so until the Circuit Court of Appeals handed down its present decision (R. 38; see *supra,* pp. 18-19).

We do not assert that the Federal courts are bound under the Rules of Decision Act to conceive of the local law as a static and fixed corpus, so that, in the absence of a local decision holding that there *is* legal liability under given circumstances the Federal courts are peremptorily obliged to hold that *no* cause of action exists. We readily concede that "finding" local law is a task necessarily involving some elements of creation as well as discovery. But it has been made perfectly clear in recent declarations by this Court that the local law is in any event to be found

solely in the body of precedent, statute and policy upon which the State courts would base their own inferences in deciding the same question. See *West* v. *American Tel. & Tel. Co., supra.* To this extent the Federal courts are limited in creating "new law" or in expanding the contours of existing categories of law. *Moore* v. *Ill. Central Rd. Co.*, 312 U. S. 630, 634.

The majority, after stating that "opinions or prejudices concerning the matter in hand might well lead to different conclusions," proceeds to develop its own opinions and prejudices to the exclusion of opinions and prejudices deducible from New York precedent, statute and policy. Here are some of the data in New York which the majority ignored:

(a) The majority failed to advert to innumerable opinions of the State courts affirming the policy to allow wide latitude in criticism of public officials and in the expression of opinion on matters of public interest (see *supra*, pp. 14-15). Not only did the majority fail to observe this policy; judging from the context in which Judge CHASE cites the *Bennet* case, it would seem that the majority erroneously believed the local policy was to the contrary.

(b) The majority failed to consider whether the State policy favors the extension or restriction of the area of libel. In fact the State policy is to limit and restrict that field, concomitantly expanding the field of speech which is truly free. Thus Mr. Justice McCOOK in *Schwimmer* v. *Fox*, 150 Misc. 562, 565, *aff'd*, 242 App. Div. 625 (1934), noted that "The Court of Appeals in its recent cases dealing with libel has shown a tendency towards limitation." The tendency is fully operative today, as shown by *Rose* v. *Daily Mirror, Inc.*, 284 N. Y. 335 (1940). The court was there faced with the question whether it would create a "far-reaching extension of the law of libel as it has been generally understood in this State for many years"; and

that in a case making a very considerable theoretical and emotional appeal.* The court declined to do so. The same disposition toward limiting rather than multiplying actions "for words" is disclosed in *Wolfson* v. *Syracuse Newspapers, Inc.*, 279 N. Y. 716 (1939), and other cases.

The Legislature of the State of New York has exhibited a similar policy toward reducing and limiting such actions. Suggestive of this policy is, *e. g.*, the recent amendment of the Civil Practice Act cutting down the time for commencement of libel actions to one year, the smallest period of limitations appearing in the Act (§ 51); and the reversal of the age-old rule of *qualified* privilege in publishing fair reports of legislative, judicial or other public and official proceedings into a rule of *absolute and unqualified* privilege (*id.*, § 337).

(c) As we show at greater length below, the majority of the Circuit Court of Appeals, although seasonably and properly urged (R. 42-44), failed to take account of the limiting effect of constitutional guaranties embodied in the Constitution of the State of New York (and contained as well, although in different terms, in the Federal Constitution),—provisions which, if not altogether conclusive in petitioner's favor, as we contend, at least afforded reason for decision in petitioner's favor if the question was otherwise open to doubt.

On all the grounds just mentioned, we submit that the Rules of Decision Act and its animating policy have been flouted in the decision below, and under circumstances calling for correction by this Court.

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* The question was whether a cause of action should be granted a person falsely charged with being a close relative of a deceased murderer. There is authority in other States rendering such statements actionable, and it is clear that they do in fact expose the plaintiffs to "ridicule and contempt."

III. The Circuit Court of Appeals has created "new law" repugnant to the Constitutions of the State of New York and the United States.

By the decision under review the Circuit Court of Appeals has established new law to the effect that words accusing a public official of entertaining a belief in a matter of public interest which is condemned by an appreciable number of respectable people, are presumptively actionable. This new law is announced without limitation and covers the imputation of any belief, provided only it strikes the court as one which a segment of the public might regard with distaste.

While the court has not excluded the defense of truth, it is plain that the nature of the prohibited imputations is such that they would not be capable of strict legal proof in at least many instances; and that in very many if not in all cases proof of truth under common-law rules of evidence would be difficult in the extreme. For these are questions of inference from likes and dislikes, inclinations and disinclinations, affections and disaffections—a shadowland in which no one can assay the real truth but the plaintiff, and sometimes not even he. But, if the defendant cannot prove his statement by legal proof to the satisfaction of both the court and a jury, the public official becomes peremptorily entitled to damages even if he has suffered no actual injury; and damages in such punitive amount as a jury may see fit to assess.

Obviously, then, the new law announced by the court is an overhanging threat of vast dimensions, made all the more serious by reason of its essential vagueness, against the expression of ideas on matters of public concern. By the same token, and to the same extent, public officials are immunized against effective criticism.

We do not doubt that such a rule, if embodied in a statute, would be unconstitutional.

1. The guaranty of a free press involves more than a prohibition of "previous restraints"; a statute imposing

subsequent punishment unduly trammeling or embarrassing expression on matters of public interest is likewise unconstitutional. *Thornhill* v. *Alabama,* 310 U. S. 88; *Cantwell* v. *Connecticut,* 310 U. S. 296, 307.

2. It makes no constitutional difference that the penalty is imposed through processes denominated civil rather than criminal. *Cf. Near* v. *Minnesota,* 283 U. S. 697. In respect to the seriousness of the threat, the restrictive effect on communication of ideas, and the penalty in prospect or actually imposed, a suit for damages is not less and may well be more invidious than a prosecution for a fine.* (Congressman Sweeney asks damages of $250,000 in the present case, R. 5, and he instituted seventy-four other actions.)

3. A limitation on free speech is to be tested for constitutional purposes not only in the light of its impact on the particular state of facts *sub judice,* but in the light of the generality of cases that may arise under it. Proof of an abuse of power in the particular case is not a requisite for attack on the constitutionality of the rule, whether of previous restraint or subsequent punishment. *Thornhill* v. *Alabama, supra,* pp. 97-98; *Hague* v. *C. I. O.,* 307 U. S. 496, 516. Thus we have to consider the enormous area of expression which becomes at least "hazardous" (R. 38) under the new rule of liability.

4. The essential vagueness of the rule adds immeasurably to the hazard and is a further index of invalidity. *Cantwell* v. *Connecticut, supra,* p. 308. †

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* *Cf.* Holmes, COLLECTED LEGAL PAPERS, pp. 173-4.

† As Judge CLARK said, "And the making of fine distinctions in rationale is indicated by the implication that a comment suggesting plaintiff's objection to the judicial candidate for his foreign birth alone would have been proper. Of course, the uncertain threat of suit, invited by a rule at once so vague and so extensive, is a restriction on freedom of the press almost as direct as a rule of clear liability" (R. 38-39).

It is not enough to say that, as libels are traditionally punishable despite the free speech guaranty, a holding that a class of statements is libelous can raise no constitutional question. For it is obvious that whatever is added to the realm of libel is practically withdrawn from the realm of free speech, and that a point may undoubtedly be reached where expansion of the range of libel must be held unduly to restrict the permissible range of free speech. We think that point has been reached in the present case, through the enunciation of a new and sweeping rule of presumptive liability for words.

Unless the nexus between libel and free speech is as we have described it, the recent decisions of this Court protecting the right of utterance may be rendered meaningless by manipulation of the law of libel. For example, of what avail are the decisions of this Court safeguarding picketing as a constitutional right,* if a legend on a picket sign "Do Your Part! Buy Where You Can Work! No Negroes Employed Here!"† may be held libelous *per se* as an imputation to the employer of anti-Negro prejudice, as under the decision at bar it might well be?‡ This Court would certainly not tolerate any such absurd result. See *United States* v. *Hutcheson,* 312 U. S. 219, 236.

In sum, without here attempting to argue the matter fully, we believe that the decision below, if enacted as a statute of the State or the Nation, would be invalid within recent pronouncements of this Court; or at least that a question of constitutionality worthy of review by this Court would be presented.

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* *Senn* v. *Tile Layers Prot. Union,* 301 U. S. 468, 478; *Thornhill* v. *Alabama, supra; American Fed. of Labor* v. *Swing,* 312 U. S. 321.

† As in *New Negro Alliance* v. *Sanitary Grocery Co.,* 303 U. S. 552, 557.

‡ In *American Fed. of Labor* v. *Swing, supra,* the State court had granted its injunction, vacated by this Court, in part on the ground that the picketing had included the dissemination of libelous statements about the employer.

But the constitutional question becomes all the more significant because the new rule was announced by a Federal court purporting to apply the State common law.

It is now settled that a judge-made rule of substance may be unconstitutional in the same measure as a statute; this has been evolved in the very realm of free speech. *American Fed. of Labor* v. *Swing*, 312 U. S. 321. And it has been forcefully pointed out that a judge-made rule may involve greater hazards to the constitutional guaranty than a statutory rule, because necessarily defined with less precision. ROBERTS, *J.*, in *Cantwell* v. *Connecticut, supra*, p. 308. Add to this that the rule, claimed to be in derogation of a right guaranteed by the *State* Constitution, is here being established by a *Federal* court less responsive to the will of the people of the State than judges of the local courts.*

In such an instance we submit this Court has a special duty of review and supervision.

IV. The questions presented go to the essence of the democratic process and warrant review by this Court.

Since the decision in the *Tompkins* case, this Court has repeatedly declared that asserted conflict of the decision of a Federal court with applicable local law inherently raises a significant question concerning the inter-relations of the judicial systems of the States and the Nation. *Wichita Royalty Co.* v. *City Nat. Bank*, 306 U. S. 103, 107; *West* v. *American Tel. & Tel. Co.*, 311 U. S. 223, 237. This Court has many times corrected such conflicts, recognizing that correction may not safely be left to the accidents of subsequent litigation in State courts. In addition, this

* The rule of liability declared below would violate the "free speech" and "due process" provisions of the State Constitution, and the "due process" clause of the Fourteenth Amendment to the Federal Constitution, if pronounced by a State court. The fact that the case arises in a Federal court may bring into operation also the First and Fifth Amendments to the Federal Constitution.

Court cannot ignore the fact that the authority of the Circuit Court of Appeals even in a matter of local law invests its decisions with great power as precedent in courts throughout the country.

But if the Court was for such reasons prompted to grant review where the asserted conflict involved a question of the validity of a utility franchise (*Texarkana* v. *Arkansas L. Gas. Co.*, 306 U. S. 188), or the burden of proof in a land action (*Cities Service O. Co.* v. *Dunlap*, 308 U. S. 208), it should, we submit, not hesitate to grant review where the asserted conflict is on a point vital to the democratic process itself.

What the present decision means is that comment on matters of public interest and particularly on public officials has now—of all times in American history!—become a dangerous thing. It is a rule of *"caveat commentator."* To impute to an official an unpopular opinion or belief —unpopular in any given community—exposes the commentator to the "sporting element" of jury trials and punitive liability. Americans have not reached the beatific state where argument can proceed without invective, and words have potentiality for fast travel and wide dissemination. What belief on any acute political or social problem is not today viewed with distaste in some communities in the United States? Shall such words as "appeaser," "warmonger," "pacifist," "Nazi sympathizer," "fellow traveler," "Red," "Bolshevik," "Negro-hater," "Negro-lover," "Jew-hater," "Jew-lover," "pro-union," "anti-union," "Papist," "anti-Papist," "Know Nothing," "anti-Know Nothing," "Fundamentalist," "anti-Fundamentalist," and the thousand other characterizations that fill our daily press in all sections of the country, be eliminated from the vocabulary of the polemicist or used only at the risk of reprisal in the courts—and that by public officials who themselves enjoy extraordinary immunities for their own often equally intemperate utterances and ready access to instruments of self-defense (including, in the pres-

ent case, the government-subsidized franking privilege)? The right to criticize our rulers distinguishes our way of life from that of the dictatorships; it is our major corrective and without it the democratic mode is impossible. Is not the new law announced below therefore perilous to the continuance of our pattern of government? These are the issues and the questions which are at the base of the decision below.

The decision is understandable as the instinctive reaction of men who hate religious bigotry with all their heart. Presumably they felt that their decision would assist minorities subjected to bigoted attack by putting words like "anti-Semitic" in the class of statements so horrendous as to be libelous *per se*. But reflection would have shown that the decision, far from assisting minorities, deals an especially hard blow at them. It is the law of New York, as of many other jurisdictions, that defamatory statements directed against groups rather than individuals are not actionable—this is a corollary of the declared State policy favoring uninhibited controversy on public issues. See *People* v. *Edmondson*, 168 Misc. 142, 154. Thus a venal public official may trot out the "Protocols of Zion" and declaim against Jews; or against Catholics, or other minorities; and he cannot be brought to book to prove his charges. But under the present decision the members of the group defamed cannot attack a demagogue by the name he deserves without exposure to such risk as will suffice to seal their lips in the first place. Without in any way impugning the respondent—for we are here considering the broader implications of the decision—we suggest that the rule announced below puts a siege gun in the hands of bigots which will be turned against minorities.

Conclusion

For the foregoing reasons your petitioner, by its solicitors, prays that a writ of certiorari issue to the Circuit Court of Appeals for the Second Circuit, to the end that the case may be reviewed and determined by this Court and the judgment of the Circuit Court of Appeals reversed.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1941

No. 745

THE SCHENECTADY UNION PUBLISHING COMPANY

Petitioner

against

MARTIN L. SWEENEY

PETITIONER'S REPLY BRIEF

Supreme Court of the United States

October Term, 1941

No. 745

THE SCHENECTADY UNION PUBLISHING COMPANY,
Petitioner,

against

MARTIN L. SWEENEY.

PETITIONER'S REPLY BRIEF

I

Respondent's brief is pervaded by an error which vitiates his position on a basic issue.

He seeks to distinguish cases establishing the New York public official rule on the sole alleged ground that they involved merely "genuine criticism *based upon facts indisputably true*" (Res. Br. 15), or, as he says in another place, "genuine criticism based upon *official acts uncontrovertibly true*" (Res. Br. 4).

No such distinction is possible. In those cases, as in the case at bar, (a) the complaints alleged that the publications containing assertions of fact were false,* (b) motions

* *E. g., Tanzer* (240 App. Div. 203) Rec. on App., pp. 13, 15, 16; *Gardner* (237 App. Div. 200) Rec. on App., pp. 7, 8; *Hills* (214 App. Div. 752, *aff'g* 122 Misc. 212) Rec. on App., pp. 17, 18; *Duffy* (109 App. Div. 471) Rec. on App., pp. 6-7.

were made to dismiss the complaints as insufficient in law upon their face, * and (c) the courts necessarily had to assume upon such motions, and indicated that they were assuming, that the publications were false in their entirety. † The cases, therefore, definitely support the public official rule, which is to the effect that a publication concerning a public official, even if "without foundation in fact," is not libelous *per se* unless it comprises "a clear charge of corruption or gross incompetence" (*Tanzer* v. *Crowley Pub. Corp.*, 240 App. Div. 203, 205).

II

Since the filing of the petition an Ohio court of intermediate appeal has held, in *Sweeney* v. *The Scripps Publishing Co.*, that a publication falsely charging the Congressman with having said:

> "deliver us from the spirit of the worst government in the world—the spirit of Poland"

is not libelous *per se*, as against the claim that it imputed anti-Polish prejudice to respondent (Court of Appeals, 8th Dist., December 1, 1941, memo.). This holding is in line with Ohio's previous disposition of respondent's suit based on the "Merry-Go-Round" column (Pet. 7).

We cite this development as showing, by implication from respondent's own behavior, the scope and inherent dangers of the decision of the Circuit Court of Appeals under review. An "anti-Polish" case is the logical sequel to an "anti-Jewish" case. The rationale of the decision

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* In *Tanzer*, *Gardner* and *Duffy* motions were made to dismiss the complaints; in *Hills* the motion was for judgment on the pleadings dismissing the complaint, which has the same effect.

† See 240 App. Div. at 205; 237 App. Div. at 201; 122 Misc. at 215; 109 App. Div. at 474.

below will in practice, as Judge CLARK foresaw, cover an enormous area of expression concerning the acts and attitudes of public officials. Again we earnestly submit that the question is one of great public importance and worthy of review (Pet. 27-29).

Respectfully submitted,

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FEB 28 1942

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THE SCHENECTADY UNION PUBLISHING COMPANY

Petitioner

vs.

MARTIN L. SWEENEY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S BRIEF

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Supreme Court of the United States

October Term, 1941

No. 745

THE SCHENECTADY UNION PUBLISHING COMPANY,
Petitioner,

vs.

MARTIN L. SWEENEY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S BRIEF

The case is here on certiorari to review a judgment of the Second Circuit Court of Appeals (R. 36) which reversed a judgment of the District Court for the Northern District of New York finally dismissing a complaint in libel on the ground that it failed to state a cause of action against petitioner (R. 23-24).

Jurisdiction

Certiorari was applied for under Section 240(a) of the Judicial Code (28 U. S. C., §347(a)), and was granted by this Court on December 22, 1941, Mr. Justice JACKSON taking no part (R. 37).

Opinions Below

The opinion of the District Court is not officially reported but appears at R. 14-22. The prevailing opinion in the Circuit Court of Appeals, by Judge CHASE, and the dissenting opinion, by Judge CLARK, are reported in 122 F. (2d) 288 (R. 27-33). Judge CLARK likewise noted his dissent from the memorandum denial of the petition for rehearing (R. 35).

Statement

THE COMPLAINT

Respondent Martin L. Sweeney, a member of Congress from the State of Ohio, on December 13, 1939, instituted this action in the District Court for the Northern District of New York against petitioner, publisher of the *Schenectady Union Star,* basing jurisdiction on diversity of citizenship and the existence of the requisite amount in controversy.

The matter in suit, published on December 23, 1938, as a part of a column under the title "Washington Daily Merry-Go-Round," read as follows (R. 3):

> "A hot behind-the-scenes fight is raging in Democratic congressional ranks over the effort of Father Coughlin to prevent the appointment of a Jewish judge in Cleveland.
>
> "The proposed appointee is Emerich Burt Freed, U. S. District Attorney in Cleveland and former law partner of Senator Bulkley, who is on the verge of being elevated to the U. S. District Court.
>
> "This has aroused the violent opposition of Representative Martin L. Sweeney, Democrat of Cleveland, known as the chief congressional spokesman of Father Coughlin.
>
> "Basis of the Sweeney-Coughlin opposition is the fact that Freed is a Jew, and one not born in the

United States. Born in Hungary in 1897, Freed was brought to the United States at the age of 13, was naturalized 10 years later.

"Irate, Representative Sweeney is endeavoring to call a caucus of Ohio Representatives December 28 to protest against Freed's appointment."

Respondent avers that the publication was intended to "deprive him of the respect, confidence and esteem peculiarly essential to [his] * * * office" (R. 3),[1] and "was meant and intended to convey that plaintiff was and is guilty of Un-American, racial prejudice against persons of Jewish origin and guilty of conduct unbecoming a public officer and to hold plaintiff in contempt in the eyes of his constituents * * *" (R. 3-4).

The complaint is grounded upon the claim that the publication is libelous *per se*, as no items of special damages are alleged. There is a general prayer for damages in the sum of $250,000 (R. 4).

Petitioner's Motion

Petitioner moved for judgment on the pleadings dismissing the complaint on the ground that it failed to state a cause of action (R. 13).

District Court Ruling and Opinion

In its opinion granting the motion, the District Court first held that the innuendo was not correct, as "the alleged libelous article does not say, nor does it necessarily carry the inference, that plaintiff is prejudiced against and intolerant of Jews as such" (R. 15). Assuming *arguendo*, however, that the article did charge respondent

[1] The complaint also makes reference to the fact that respondent is a lawyer, but both the District Court and the Circuit Court of Appeals exclude the claim that respondent was libeled in his profession as a lawyer since the publication does not refer to him in that capacity. Both opinions properly cite *Keene* v. *Tribune Assn.*, 76 Hun (N. Y.) 488, in support of this proposition (R. 20, 29).

with such prejudice, the court held it was not libelous *per se* under New York decisional law,[2] which was applicable to the case under *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64 (R. 15). The court indicated that formulary definitions of libel *per se* in terms of exposing the plaintiff to "public contempt, ridicule, aversion," etc., while describing what must be the general effect or tendency of a publication before it can be held presumptively actionable, do not of themselves set up a sufficiently definite criterion for the decision of a particular case (R. 18). Decision will turn upon the specific circumstances *sub judice.* Here it is an important circumstance that a public official is involved. "In a constitutional republic where freedom of speech and the press is guaranteed, comment on, or criticism of the political or official acts or views of a public officer is not libelous *per se,* merely because it hurts his feelings or distresses him" (R. 19). The court cited and discussed authority in the Court of Appeals and the Appellate Divisions establishing the rule that, where the publication concerns a public official in a matter of public concern, no accusation short of a charge of corruption or definite misconduct or impropriety in office is libelous *per se* (R. 18-19). It further remarked upon the absurdity of a holding that a charge of racial prejudice in a matter of political appointment is presumptively actionable when it is known that "Prejudices relating to nationality and religion are quite common" and "many people have prejudices of some kind" (R. 21).

The motion to dismiss was accordingly granted, but apparently recognizing that a false statement, although not libelous *per se,* remains actionable in New York if specific items of damage can be alleged and proved,[3] the court

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[2] There is no New York statute defining civil libel.

[3] *Al Raschid* v. *News Syndicate Co.,* 265 N. Y. 1, 4; *O'Connell* v. *Press Pub. Co.,* 214 N. Y. 352; *Samson U. Corp.* v. *Dover Mfg. Co.,* 233 App. Div 155; *Husted* v. *Husted Co.,* 193 App. Div. 493; and see *infra,* p. 15.

granted respondent leave to amend (R. 23). On respondent's failure to amend, final judgment was entered in petitioner's favor (R. 23-24).

Majority Opinion in Circuit Court of Appeals

The majority opinion in the Circuit Court of Appeals interprets the article as charging respondent with racial prejudice (R. 20), and upon that basis holds it to be libelous *per se*.

Judge Chase relies upon three New York cases.

He quotes from *Kimmerle* v. *New York Evening Journal, Inc.*, 262 N. Y. 99, 102, a general definition of words libelous *per se* as those which tend "to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation, or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society"; and he says that *Sydney* v. *MacFadden Newspaper Pub. Corp.*, 242 N. Y. 208, is to the same effect.

Conceding that "It is, of course, not easy to apply the general test to a case of this nature," and that "Opinions or prejudices concerning the matter in hand might well lead to different conclusions" (R. 30), Judge Chase proceeds straightway to attempt to apply the general definition to the case in hand. He does not seem to attach special significance to the fact that a public official is involved, and fails to cite or distinguish the bulk of cases upon which the District Court rested in its discussion of the public official rule. The only public official case cited by Judge Chase is *Bennet* v. *Commercial Advertiser Assn.*, 230 N. Y. 125, and of this he says that "when made of a public official, false accusations which may well lead right-thinking people to believe him unworthy of public trust and confidence are libelous *per se*" (R. 30). (In fact the Court of Appeals in the *Bennet* case used quite different

language,[4] and both the language and the facts of that case support the public official rule.)

The rest of the Judge's opinion is devoted to stating what appears to be the Judge's own view of the policy considerations involved, without reference to those enunciated by the authorities in New York. In this connection he observes that the article was probably hurtful to respondent among those persons who hate racial or religious intolerance, and that freedom of speech is not a license to spread damaging falsehoods (R. 31).

Dissenting Opinion in Circuit Court of Appeals

In dissenting, Judge Clark states that the decision of the majority is "not in accordance with New York law" (R. 31). He rests upon the *Bennet* case in the Court of Appeals and the decisions of the Appellate Divisions in *Tanzer* v. *Crowley Pub. Corp.*, 240 App. Div. 203; *Gardner* v. *Home Life Pub. Inc.*, 237 App. Div. 200; and *Hills* v. *Press Co.*, 122 Misc. 212, *aff'd*, 214 App. Div. 752, in support of the New York rule applicable to public officials (R. 31-32).

He observes that this view of the problem presented by the case seems general, as shown by the prevailing results in the seventy-five actions[5] brought by respondent in his home State and in other jurisdictions throughout the country based on the same or substantially the same publication (R. 32). Judge Clark calls particular attention to the opinions in *Sweeney* v. *The Beacon Journal Pub. Co.*, 66 Ohio App. 475, *app. dism.*, 138 Ohio St. 330; *Sweeney* v. *Newspaper Printing Corp.*, 177 Tenn. 196 (*per* Green, *C.J.*), and *Sweeney* v. *Capital News Pub. Co.*, 37

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[4] The words just quoted from Judge Chase's opinion are seemingly taken from the last paragraph of the *Bennet* opinion, but the precise language used by the Court of Appeals was "unworthy of public trust *and* a *betrayer* of civic confidence" (p. 132; italics ours).

[5] See the Petition for Rehearing.

F. Supp. 355 (D. Ida.). (Since the date of the decision under review, Judge ALLRED in the United States District Court in Texas has dismissed a complaint, filing a comprehensive opinion which takes sharp issue with the reasoning of the majority herein. *Sweeney* v. *Caller-Times Pub. Co.*, 41 F. Supp. 163, Aug. 21, 1941.)[6]

The "new law at least for New York State" created by the majority decision is "definitely disturbing law" (R. 32), and destructive of a free press. Judge CLARK says (R. 32-33):

> "• • • It would be a fine world to live in if only tolerance were so usual that a charge of the lack thereof against a public official could be so presumptively untrue that it would seem on its face unfair and libelous. But in our present world we must not take the naive view that what ought to be is, and that whoever suggests the contrary is a slanderer; for if we do so, we shut off all healthy criticism of prejudice, and allow bigotry full scope to act with impunity. Even more dangerous is the rationale of the decision that a comment leading an appreciable number of readers to hate or hold in contempt the public official commented on is libelous *per se*. Its broad sweep would take in comments found day after day in the most conservative newspapers, either in direct statement or as quotations of responsible critics, that a public official, particularly a legislator, is pro- or anti-labor, or pro- or anti-Nazi, or pro or anti this or that race, color, or creed. Minority comment on labor, religious and political views and activities of politicians becomes therefore hazardous. And the making of fine distinctions in rationale is indicated by the implication that a comment suggesting plaintiff's objections to the judicial candidate for his foreign birth alone would have been proper. Of course, the uncertain threat of

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[6] The two unreported decisions by HOLLY, *D. J.*, in the Northern District of Illinois, Eastern Division, holding the articles there involved to be libelous *per se* (*Sweeney* v. *Joliet Printing Co.*, No. 1204, and *Sweeney* v. *Illinois Pub. & Print. Co.*, No. 1201 [1940]), were distinguished by the District Court and the dissenting Judge herein (R. 20, 32). See also *infra*, pp. 41-42.

suit, invited by a rule at once so vague and so extensive, is a restriction on freedom of the press almost as direct as a rule of clear liability.

"I do not think it an adequate answer to such a threat against public comment, which seems to me necessary if democratic processes are to function, to say that it applies only to false statements. For this is comment and inference, as the *Tanzer* case suggests, and hence not a matter of explicit proof or disproof. The public official will always regard himself as not bigoted, and will so testify, sincerely enough. And then the burden of proving the truth of the defense will rest upon the commentator, who must sustain the burden of showing his inference true. If he fails in even a minority of the suits against him—as the sporting element in trials to juries susceptible to varying shades of local opinion would make probable—he is taught his lesson, and a serious brake upon free discussion established. But the common-law requirement of proof of special damages gives him the protection he needs, while at the same time it does prevent him from causing really serious injury and loss by false and unfair statements. That should be the rule applied here, as the district court held."

Specification of Error

The Circuit Court of Appeals erred in holding that the complaint states a cause of action against petitioner, and in reversing the judgment of the District Court and failing to affirm the same.

Statute and Constitutional Provisions Involved

The Rules of Decision Act (Judiciary Act of 1789, c. 20, § 34, 28 U. S. C., § 725) provides:

> "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Also pertinent are the First, Fifth and Fourteenth Amendments to the Constitution of the United States, and the "free speech" and "due process" clauses of the Constitution of the State of New York (Article I, Section 8; Article I, Section 6).

POINT I

The writing at bar must be held not libelous *per se* under the New York rule respecting public officials, and under the independently applicable New York rule respecting imputations of state of mind or opinion on matters of public concern.

(A) Question of Law Presented

The Circuit Court of Appeals construed the statement that Congressman Sweeney opposed the nomination of Freed as Ohio District Judge because Freed was "a Jew, and one not born in the United States," as tantamount to a charge that the Congressman was actuated by racial or religious prejudice.

We disagree with this interpretation and shall state the reasons for our disagreement below (see Point IV); but for purposes of the present Point we assume it to be correct. On this assumption the question is, whether the gravest sanction of the law of libel—liability without proof of special damages—should attach to a writing concerning

a public official, in respect to a matter of public interest, which, while not imputing to him incompetence or corruption in office, incorrectly asserts that he entertains a state of mind or opinion[1] deemed to be prejudiced by some respectable members of the public.

That question was answered in the affirmative by a majority of the court below, and with no expressed limitation on the broad sweep of the doctrine thus enunciated.[2]

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[1] For purposes of the New York rule as to public officials, hereinafter discussed (section (C) of this Point), we need not mark any distinction between "act" and "state of mind" or "opinion."

Correct appraisal of the case is assisted, however, by noting that there was nothing wrongful in merely opposing Freed for District Judge and to charge that the Congressman had done so would not be libelous; the sting of the alleged libel, if any, must reside in the implication that he had done so because he had a certain state of mind or opinion concerning Jews or foreign-born Jews as candidates for public office. This factor is stressed in section (D) of this Point.

[2] The scope of the decision below may be illustrated in the context of the present litigation. In *Sweeney* v. *Caller-Times Pub. Co.*, 41 F. Supp. 163 (D. Tex.), the publication sued on contained two paragraphs which were cut out of the "Merry-Go-Round" column as it appeared in petitioner's newspaper. These paragraphs stated that there were other persons on the Bar Association's preferred list; one had eliminated himself for physical reasons; two were eliminated by Justice Department officials "because of big business or reactionary connections"; one was eliminated because he was "a Catholic and the last two judicial appointments in Ohio have been Catholics." So the Department turned to Freed. Was this a libel on officials of the Justice Department as charging them with being anti-big business or anti-Catholic? Or on the persons accused of reactionary connections? It would seem so, under the decision herein.

Again, we noted in our Reply Brief on Certiorari that Congressman Sweeney recently sued a Cleveland newspaper on the basis of an alleged misquotation which carried the implication that the Congressman was *anti-Polish*. The complaint was held insufficient in law by the Court of Appeals of Ohio, Eighth District (*Sweeney* v. *The Scripps Pub. Co.*, Dec. 1, 1941, memo.), in line with the earlier Ohio decision in the "Merry-Go-Round" litigation (*supra*, p. 6). But it is clear from respondent's own behavior that an "anti-Polish" case, and thousands like it, fall flatly within the rationale of the majority's opinion herein, as Judge CLARK observed.

(B) Majority's Fallacious Analysis of New York Law

The decision below rests substantially upon the language of two cases—*Kimmerle* (262 N. Y. 99) and *Sydney* (242 N. Y. 208)—"defining" the whole concept of libel *per se* in terms of tendency to expose the plaintiff to "ridicule and contempt." The majority attempts to apply the "definition" as if it were the major premise of a cover-all syllogism, and the true meaning of the words could be established by reference to a dictionary. It apparently does not recognize that the "definition" contains words of art whose meaning must be sought in the holdings of cases, and that the "definition" yields, in the process of actual decision, to more specific formulations in terms of the identity of the plaintiff and the occasion and type of utterance involved. There is no attempt in the majority opinion to analyze the facts of the cited cases, which are in reality as far removed from the facts of the present case as can well be imagined. (*Kimmerle* involved slurs cast upon the proprietor of a rooming house who had allegedly become friendly with a self-confessed wife murderer; held, no libel. *Sydney* concerned imputations on the chastity of a married woman referred to in the publication as Fatty Arbuckle's latest lady love.) The majority omits mention of cases, including cases cited by the District Court and the dissenting Judge, and including cases in the State courts of intermediate appeal, which do, on their facts, resemble the case at bar. And it does not attempt to grapple with the considerations of policy which are at the base of the New York law of libel. We submit that this is not the proper way to "find" law, and by the same token it is not the proper way to find State law under the rule of *Erie Railroad Co.* v. *Tompkins.*[3]

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[3] A similar approach by English courts of the early nineteenth century to the question of libel evoked the following satiric thrust from Jeremy Bentham: "* * * in point of actual law, a libel is any paper in which he, who to the will adds the power of punishing for it, sees anything that he does not like: * * *" ELEMENTS OF THE ART OF PACKING AS APPLIED TO SPECIAL JURIES PARTICULARLY IN CASES OF LIBEL LAW (London 1821), p. 2.

It is obvious that the "definition"—and actually many differing "definitions" are rehearsed in the cases[4]—is the barest indication of the content of a great, diversified branch of the law of torts. The "definition" affords no real guide in the decision of a particular case. This appears implicitly in the very *Kimmerle* opinion (see at p. 102). Statements apparently exposing persons to the kinds of public regard mentioned in the "definition" have been held not presumptively actionable; and contrariwise, statements apparently not affecting persons in those ways have been held presumptively actionable. See, *e. g., Rose* v. *Daily Mirror, Inc.*, 284 N. Y. 335; *Katapodis* v. *Brooklyn Spectator, Inc.*, 287 N. Y. 17; *Kloor* v. *New York Herald Co.*, 200 App. Div. 90; *Lamberti* v. *Sun Printing Assn.*, 111 App. Div. 437; *Cohen* v. *New York Times Co.*, 153 App. Div. 242; *Schweikert* v. *New York Eve. Jo.*, 132 Misc. 169 (Sup. Ct.); *cf.* L. HAND, *C. J.*, in *Burton* v. *Crowell Pub. Co.*, 82 F. (2d) 154 (C. C. A. 2); *Sim* v. *Stretch*, 52 T. L. R. 669; *Clay* v. *Roberts*, 8 L. T. 397. Attempts by courts and textwriters to bring all the cases within one intelligible rubric have always failed, as inevitably they must. For definitions are useless and deceptive unless they are sufficiently narrowed and diversified to take account of those variations in the facts which make their appeal to the differing and competing considerations of social policy.

Under more vigorous analysis than was applied by the majority, the decided cases in New York are seen to yield particular rules or working hypotheses as to writings (1) relating to public officials in matters of public concern, and (2) relating to imputations of state of mind or opinion on matters of public concern. Each of these rules is applicable to this case. The District Court and the dissenting Judge rested principally on the first rule, but also adverted to the second consideration. The majority of the Circuit Court of Appeals observed neither rule.

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[4] See Seelman, LAW OF LIBEL AND SLANDER (1933), p. 4 ff.

(C) Public Official Rule in New York

Judge CLARK correctly says that in New York

> "the right of comment on a public official has been safeguarded in a practical way by 'a somewhat different rule' than in ordinary cases and 'a clear charge of corruption or gross incompetence holding one up to disgrace and contumely' is required"

before a statement concerning a public official will be held libelous *per se* (R. 31).

In support of this formulation of the public official rule, Judge CLARK cites and discusses the case of *Bennet* (230 N. Y. 125), *Tanzer* (240 App. Div. 203), *Gardner* (237 App. Div. 200), and *Hills* (122 Misc. 212, *aff'd*, 214 App. Div. 752), which are also cited and discussed in the opinion of the District Court. The effect of the decisions is given in the *Tanzer* case, as follows (p. 205):

> "One who holds public office must expect criticism. It may be captious, ill-timed and without foundation in fact,[5] but, outside of a clear charge of corruption or gross incompetence holding one up to disgrace and contumely, there is no libel."

Restated, the rule is that, beyond any question of the putative effect of the publication on the mind of the reader in creating the kinds of distaste mentioned in the general

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[5] In his Brief Opposing Certiorari, respondent sought to distinguish the cases here relied upon on the alleged ground that they involved merely *"genuine criticism based upon facts indisputably true"* (Res. Br. 15), or, as he said in another place, *"genuine criticism based upon official acts uncontrovertibly true"* (Res. Br. 4). No such distinction is possible. In these cases, as in the case at bar, the complaints alleged that the publications containing assertions of fact were false, motions were made to dismiss the complaints as insufficient in law upon their face, and the courts indicated in their opinions that they were assuming that the publications were false in their entirety. The complaints were dismissed where the writings, although assumed to be false, did not charge "corruption or gross incompetence." See Pet. Reply Br. on Cert. 1-2.

definitions, no writing concerning a public official, as to a matter of public concern, will be held actionable *per se* unless it imputes to the official a behavior pattern involving corruption or gross incompetence. By reference to this rule the publication at bar is not libelous *per se;* not even the majority appears to claim otherwise.

The notions of policy which underlie this rule will be described at length below (Point II). In brief, the rule is based on a weighing and balancing of competing interests. New York believes that the interest of the public official in his personal comfort is not absolute and must on occasion yield to the interest in free, even if false discussion of official behavior and opinion; that persons who are thin-skinned usually have the choice of avoiding abuse by declining to throw themselves into the public arena through accepting public office or asking the favor of votes;[6] and that officials, protected as they are by certain extraordinary immunities from liability for their own utterances,[7] and usually enjoying readier access to the press than other people, have effective means of self-defense against false attacks other than resort to lawsuits.[8] These considerations, among others,[9] argue for a limitation of

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[6] See *United States* v. *Morgan,* 313 U. S. 409, 421.

[7] Thus respondent, with absolute immunity for utterances on the floor of Congress, has made remarks in the House about the present litigation. 87 Cong. Rec., p. A5634 (Nov. 25, 1941); 87 *id.*, p. A4039 (Aug. 6, 1941); 84 *id.*, p. 8694 (May 25, 1939). These utterances could be franked into New York without accountability for libel, according to express statute. N. Y. C. P. A., § 337.

[8] Compare FRANKFURTER, *J., dissenting* in *Bridges* v. *California,* ..... U. S. ....., ..., 86 L. Ed. 149, 169: "Presidents and governors and legislators are political officials traditionally subject to political influence and the rough and tumble of the hustings, who have open to them traditional means of self-defense."

[9] See Point II, *infra,* pp. 23-25. New York recognizes that the American public is traditionally skeptical in its acceptance of words cast out in political debate. See *Hills,* 122 Misc. at p. 215; *Gardner,* 237 App. Div. at p. 202; *cf. Lydiard* v. *Wingate,* 131 Minn. 355, 358.

the area of libel *per se* in respect to public officials. False charges of corruption or gross incompetence, however, remain presumptively actionable. And false charges falling short of such imputations, while not presumptively actionable, remain actionable when real injury can be shown, in the form of the suit for special damages (see Judge CLARK's dissent, R. 33; *Cortright* v. *Anderson*, 208 App. Div. 1, 3-4; *Duffy* v. *New York Evening Post Co.*, 109 App. Div. 471, 475; cases cited *supra*, p. 4, note 3).

1. CASES INVOLVING "A CLEAR CHARGE OF CORRUPTION OR GROSS INCOMPETENCE"

The majority reads the one public official case cited by it, *Bennet*, as deciding that "when made of a public official, false accusations which may well lead right-thinking people to believe him unworthy of public trust and confidence are libelous *per se*" (R. 30). If such were the test, virtually every statement made in the course of a political campaign or in partisan editorial comment would carry a potentiality of libel, since it is always the purpose of one side to show that the other is "unworthy of public trust and confidence." Actually the Court of Appeals, in the part of its opinion which the majority was seemingly restating, used the words "unworthy of public trust *and* a *betrayer* of civic confidence" (p. 132); and in another part of the opinion the court said that the plaintiff was charged with "serving the financial interests of a former client by the *betrayal* of his public duties" (p. 130). The present case involves no charge of "betrayal." In any event, however, the language of the court must be read in the light of the facts. Bennet, an attorney and a member of Congress, was accused of acting as a cheat by slipping a "joker" into a bill, against the public interest and in order to create huge unwarranted profits for his clients. Thus Bennet was accused of an underhanded act involving corruption in office. Judge CLARK correctly analyzes

the *Bennet* case (R. 31) which conforms to and supports the rule upon which he relies.

Similarly we find that other cases in New York cited in respondent's brief opposing certiorari, holding statements critical of public officials to be libelous *per se*, involved charges of gross incompetence or accusations of corrupt conduct.

Hamilton v. *Eno*, 81 N. Y. 116: Plaintiff was accused of accepting emolument from a pavement company for having recommended its product to the city.

Powers v. *Dubois*, 17 Wend. (N. Y.) 63: Plaintiff was accused of opposing a great public improvement "for private and sinister purposes"—prostituting the office for "the furtherance of his own private schemes."

Bingham v. *Gaynor*, 203 N. Y. 27: Plaintiff was accused of corruption, wilful violation of law, incompetence and scoundrelism.

Mattice v. *Wilcox*, 147 N. Y. 624: Plaintiff was accused of dishonesty and arrant incompetence.

De Hoyos v. *Thornton*, 259 App. Div. 1: Plaintiffs were accused of being "dictated to by gangsters."

Sumner v. *Liberty Pub. Corp.*, 240 App. Div. 118: Plaintiff was accused of deliberately eliminating competent employees and substituting incompetents.

Foley v. *Press Pub. Co.*, 226 App. Div. 535: Plaintiff was charged with "fixing" and "rigging" in connection with an official inquiry.

Cortright v. *Anderson*, 208 App. Div. 1: Plaintiff was accused of lining up with gamblers.

Lunn v. *Littauer*, 187 App. Div. 808: Plaintiff was accused during the World War of "being the agent of selfish and designing business men, seeking to gain 'big money' though his supposed in-

fluence in procuring shipping for their own products, in disregard of the rights of the nation."

Hoey v. *New York Times Co.*, 138 App. Div. 149: It was charged that plaintiff in "voting in opposition to the bill, was corruptly and improperly influenced by a desire to aid and assist the league • • • which, if it exists, must have been founded • upon bribery and corruption."

Cohalan v. *New York W. T. Corp.*, 172 Misc. 1061 (Sup. Ct): Plaintiff was accused of perversion of justice and deliberate suppression of testimony.

2. Cases Involving Less Than "a Clear Charge of Corruption or Gross Incompetence"

On the other hand, as Judge Clark says, New York cases "hold not libelous *per se* comments on public officers more directly suggesting corrupt motives than does the one here—which charges rather bigotry and prejudice than corruption or impropriety in office" (R. 31).

Duffy v. *New York Evening Post Co.*, 109 App. Div. 471: Plaintiff, a Republican, was said to be "Absolutely devoid of any knowledge of the customs of polite men. Does well in business, especially during Tammany regimes. Devotes his time and energy more to assisting the Tammany leaders than to working for his own nominal party. Is reported to be about to join Tammany openly soon. Apparently knows no more of and cares no more for political principles than he does of the silurian age in geology. Mixes in Tammany factional fights, to the detriment of the Republican Party. A most unworthy choice."

Tanzer v. *Crowley Pub. Corp.*, *supra*: Plaintiff was charged with appointing a city attorney to protect a client of the attorney who had filed handpicked assessment rolls.

Gardner v. *Home Life Pub. Inc., supra*: Plaintiff was accused of having declared the city's finances were sound the day before a huge deficit was announced.

Hills v. *Press Co., supra*: Plaintiff was accused of favoritism and unfairness and inactivity in office.

Cortright v. *Anderson, supra*: Plaintiff, running on the Prohibition ticket, was accused of being in fact a "wet."

Rossiter v. *New York Press Co.*, 141 App. Div. 339: It was charged that plaintiff's services "were not worth what he was paid."

De Hoyos v. *Thornton, supra*: Plaintiffs were accused of being "extravagant" and engaged in "ruthless spending."

Murden v. *Westchester County Pub., Inc.*, 252 App. Div. 890 (memo.), *app. den.*, 278 N. Y. 740: Plaintiff was accused of being an outsider who exercised a "dictatorship" over a village, the village trustees being his "trained seals" (see Rec. on App., pp. 13, 14).

Authority in other jurisdictions is in accord with the New York public official rule. For example, the following accusations have been held not libelous *per se*: "could be trusted to organize the House in the interests of brewery control," reactionary, "consistently wrong on every matter in which the interests of the people were involved" (*Lydiard* v. *Wingate*, 131 Minn. 355); "political traitor," without "honor, ability, or courage to fight his own battles," "nondescript," "nincompoop" (*Settlage* v. *Kampf*, 10 Ohio Dec. Rep. 822); political doubledealing, "political connivance or something worse" (*Barr* v. *Providence Telegram Pub. Co.*, 27 R. I. 101); "frequently affected mind" (*Mayrant* v. *Richardson*, 1 N. & McC. [S. C.] 347); "unfit to represent the people," "never did an honest day's work," "a confessed ignoramus," "unedu-

cated, lazy and ignorant" (*Sweeney* v. *Baker*, 13 W. Va. 158); see also, *Peck* v. *Coos Bay Times Pub. Co.*, 122 Ore. 408; *Shaw* v. *Crandon Printing Co.*, 154 Wis. 601; *Hoan* v. *Journal Co.*, 238 Wis. 311, *cert. den.*, Nov. 10, 1941; *Rustgard* v. *Troy*, 6 Alaska 338; Newell, SLANDER AND LIBEL (4th Ed., 1924), p. 57; and cases cited *supra*, pp. 6-7.

(D) New York Rule as to Imputation of State of Mind or Opinion on a Public Question

We have so far centered our discussion upon one factor in the case—that the publication concerned a public official. We now turn to another and different factor, wholly ignored by the majority below—that the sting of the alleged libel, if any, lies in the charge that respondent had a certain state of mind or entertained a certain opinion which influenced his position respecting a political appointment. Putting to one side that respondent is a public official, the inquiry is whether to write of anyone that he has an attitude on a matter of public concern which is condemned by some respectable people, may be held presumptively actionable.

New York holds against such liability, in deference to the importance of free discussion (which might obviously be cut off entirely, under the view of the majority, where all sides of a public question are condemned by differing but respectable segments of the public), and for other reasons of social policy which will be considered at greater length hereinafter (Point II).

Thus it is not libelous *per se* to write of a man that he sponsors legislation for selfish advantage at the expense of taxpayers generally (*Foot* v. *Pitt*, 83 App. Div. 76); is a "wet," even though purporting to be a "dry" (*Cortright* v. *Anderson*, *supra*, p. 3); "professing a particular religious belief supports another with the intention of soon becoming a convert to that other faith" (*Duffy* v. *New York Evening Post Co.*, *supra*, p. 475); is an advocate

of rum (*Flanagan* v. *McDermott Dairy Co.*, 132 App. Div. 166, 168); is a believer in the principles of anarchy (*Von Gerichten* v. *Seitz*, 94 App. Div. 130, 132);[10] "approves of Fascism, Nazi-ism and supports the cause of the Spanish rebels" (*Consolidated Press & Printing Co.* v. *New York W. T. Corp.*, N. Y. L. J., Jan. 31, 1938, p. 507 [Sup. Ct.]); is "anti-social," "un-American," "Fascist" or a "Hitlerite" (*McAuliffe* v. *Local Union No. 3*, 29 N. Y. Supp. [2d] 963 [Sup. Ct.]); is a "Bolshevik" or a "Red." *Petroff* v. *Sun-Herald Corp. Inc.*, N. Y. L. J., Aug. 18, 1923, p. 1609 (Sup. Ct.). And there is strongly reasoned authority that to charge a man with being a "Communist" is not libelous *per se*. *Garriga* v. *Richfield*, 174 Misc. 315 (Sup. Ct.—Pecora, *J.*).[11] See also, *National Variety Artists, Inc.* v. *Mosconi*, 169 Misc. 982 (Sup. Ct.); *Goldberger* v. *Philadelphia G. P. Co.*, 42 Fed. 42 (S. D. N. Y.).

Authority in other jurisdictions is to the same effect. See *Rutherford* v. *Dougherty*, 91 F. (2d) 707 (C. C. A. 3) ("we cannot say that to state the plaintiff's address foments religious hatred and bigotry is libelous"); *Sullivan* v. *Meyer*, 91 F. (2d) 301 (C. A. D. C.) (strong criticism of plaintiff's stand concerning the teaching of radical doctrine in public schools, held not libelous *per se*); *Snavely* v. *Booth*, 36 Del. 378 (not libelous *per se* to say of an educator that he favors the teaching of birth control in secondary schools—"We have been referred to no authority, nor have we been able, in an extended search, to find

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[10] Otherwise, of course, if the accusation is tantamount to a charge of criminal anarchy under the New York statute. *Id.*

[11] In *Levy* v. *Gelber*, 175 Misc. 746 (Sup. Ct.), the ruling was to the contrary, but the court lays stress on the fact that the publication was addressed to the plaintiff in his profession as a lawyer (which is not true in the present case, R. 20, 29), and emphasizes that recent legislation has imposed various definite disabilities on Communists (which is not true of persons having racial or religious prejudice). Although the decision is thus distinguishable, counsel believe the *Levy* case was improperly decided, is against the weight of authority in New York, and is not as well reasoned as the *Garriga* case.

authority, holding that criticism of mere opinion or theory is actionable defamation"); *Donaghue* v. *Gaffy*, 54 Conn. 257 (not libelous *per se* to write that plaintiff's actions stemmed from "selfish meanness"); *Hanaw* v. *Jackson Patriot Co.*, 98 Mich. 506 (or to accuse plaintiff of having played a "dirty, Jew trick"); *Sullivan* v. *Warner Bros. Theatres, Inc.*, 42 Cal. App. (2d) 660 (or to accuse plaintiff of "disloyalty" to his neighborhood); *Settlage* v. *Kampf, supra* (or to charge a man with advocating "false doctrines in theology or politics"); *Gough* v. *Goldsmith*, 44 Wis. 262 (or to write of a Catholic that he "is no longer a Catholic"); *Shaw* v. *Crandon Printing Co., supra* (or to charge a man with "standing as an obstacle in the path of municipal progress and with being a reactionary"); *Strickland* v. *Bonnici*, 78 Sol. J. 820 (P. C.) (*semble*: not libelous *per se* to accuse a bishop of "stupid and unwarranted attacks" on the "tenets of faith"); see also, *Peck* v. *Coos Bay Times Pub. Co., supra; Mayrant* v. *Richardson, supra.*

Probably the most notable decision of the kind, squarely in point here, is that of Mr. Justice (then Chief Judge) Holmes in *Fay* v. *Harrington*, 176 Mass. 270, holding that it was not libelous *per se* to write of a theatre owner that he discriminated unfairly against the Irish.[12]

The "state of mind" or "opinion" rule is a necesary complement of the doctrine, well settled in New York (but also ignored by the majority below), that there is no remedy, civil or criminal, for calumnies directed against *large segments of the community such as racial groups or*

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[12] In holding in the *Fay* case (1900) that the charge was not libelous *per se*, the Justice remarked that "It cannot be said that such a charge necessarily and in all populations would be hurtful in its effect upon a man's business" (p. 271). This is to be contrasted with the Justice's *aperçu* in a more ordinary libel case, *Peck* v. *Tribune Co.*, 214 U. S. 185, 190 (1909) (influenced by "privacy" considerations; not concerned with "state of mind" on a public question nor involving a public official), that the question of libel was not necessarily one of "a majority vote."

religious denominations. The pertinent authorities were recently analyzed in *People* v. *Edmondson,* 168 Misc. 142 (Gen. Sess.); see *Ryckman* v. *Delavan,* 25 Wend. (N. Y.) 186, 198; *Sumner* v. *Buel,* 12 Johns. (N. Y.) 475; *Weston* v. *Commercial Adv. Assn.,* 184 N. Y. 479, 483; Note, 97 A. L. R. 281. The immunity thus attaching to so-called "group libels" (*e. g.,* charges that Negroes are syphilitic, that Catholics are traitors, or that Jews are ritual-murderers) rationally calls for a large latitude in permitting characterizations of the state of mind of persons who may be conceived to have assumed one posture or another in respect to groups in the community (*e. g.,* characterizations as "anti-Negro" or "anti-Catholic" or "anti-Semitic"). Such imputations may indeed on occasion overshoot their marks; but again the existence in New York of the action for special damages is conceived to work a rough balance of justice.

We submit that separately or in combination the two rules considered in this Point are dispositive of the case in petitioner's favor.

POINT II

Underlying principles and policies of local law are likewise dispositive of the case in petitioner's favor.

Having virtually ignored the cases and rules of law most closely in point, the majority below believed the question at bar was doubtful (R. 30). It therefore resorted to an argument of policy—the touchstone of decision where the cases are not themselves determinative.

Our Point I has shown that the question was not at all doubtful. But we now propose to show that the majority's argument of policy is intrinsically insufficient, and that underlying conceptions of local law (and of law prevailing generally), operating upon all the circumstances at bar, would compel a holding in petitioner's favor even in the absence of those particular rules upon which we rely.[1]

(A) Applicable Principles

The only substantial appeal to policy made by the majority below was that, particularly in a community with a large Jewish population, the utterance at bar was likely to injure respondent (see at R. 30-31). That this consideration is not by any means controlling is at once indicated by the fact that many statements undoubtedly injurious are held not libelous *per se, e. g., Rose* v. *Daily Mirror, Inc.*, 284 N. Y. 335 (charging a person with being a close relative of a deceased murderer). Nor would it begin to explain why respondent was not remitted to an action for special damages, as in the view of the District Court and the dissenting Judge he should have been.

Plainly Judge CHASE's analysis is one-dimensional. It fails to take account of interests beyond that of respondent in his personal comfort.

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[1] We are again assuming *arguendo* that the publication charged respondent with racial prejudice in the matter of a political appointment.

The law of New York and the law prevailing generally recognize, and in the present case exalt, certain overriding societal interests.

1. The State whose courts and town halls once resounded to the cases of *Zenger* and *Crosswell*[2] has traditionally noted the close relation between actionable defamation and freedom of speech and the press—that whatever is added to the category of libel is in actuality withdrawn from the category of free debate. See *Marlin Fire Arms Co.* v. *Shields*, 171 N. Y. 384, 391; 2 KENT'S COMMENTARIES (13th Ed., 1884), p. 17. Significant libel cases present a collision between the individual's interest in personality and the broader interest in that freedom which is "the matrix, the indispensable condition, of nearly every other form of freedom" (*Palko* v. *Connecticut*, 302 U. S. 319, 327).

This consideration has in itself argued for caution in extending the area of actionable defamation. The caution is underlined and emphasized in the present case, for:

(a). The utterance concerns a public official.

It is the declared policy of New York that the area of permissible expression should be broader in the case of such a personage than in the case of a private citizen. Statements to this effect are uniform and multitudinous. "There should be publicity commensurate with the interest of the public in public affairs. And the policy of the law is that the public should at all times be informed of the acts of its servants and the considerations to be applied in determining whether or not the public welfare is being served, in order that it may be at all times aroused and alert to its just and essential part in the administration of government." *Tanzer* v. *Crowley Pub. Corp.*, 240 App. Div. 203, 205-6; see *Hoeppner* v. *Dunkirk Printing Co.*, 227 App. Div. 130, 133-4, *aff'd*, 254 N. Y. 95; *Cortright* v.

[2] 17 How. St. Tr. 675; 3 Johns. Cas. 337.

Anderson, 208 App. Div. 1, 3; *Howarth* v. *Barlow*, 113 App. Div. 510, 513; *Gardner* v. *Home Life Pub. Inc.*, 237 App. Div. 200, 202; *Hills* v. *Press Co.*, 122 Misc. 212, 215, *aff'd*, 214 App. Div. 752; *Duffy* v. *New York Evening Post Co.*, 109 App. Div. 471, 474-5; *Burnham* v. *Hornaday*, 130 Misc. 207, 215, *aff'd and mod.*, 223 App. Div. 218; *People* v. *Hebberd*, 96 Misc. 617, 637, 646.

(b). Apart from the type or character of the plaintiff in suit, the matter involved is one of public concern and the article deals with opinion or attitude thereon.

New York recognizes that the interest in such discussion is especially great, because this is the stuff out of which governmental policy is fashioned. It further recognizes that debate upon important public issues could hardly proceed if shorthand characterizations of opinion or attitude, carrying opprobrious implications in some quarters, could not be freely used. Mr. Justice Pecora of the State Supreme Court has properly said in this connection (*Garriga* v. *Richfield*, 174 Misc. 315, 320-1):

> "• • • Any rule to the contrary [*i. e.*, a holding that accusation of belief in Communism was libelous *per se*] would abridge that freedom of discussion relative to parties, principles and personalities in the political arena, which is so vital to the preservation of our democracy. To deprive our citizens of the right freely to debate political issues, or to allude to the political affiliations of others, is to make a breach in the dike which protects our cherished institutions. Far better it is to preserve that right unhampered—even with the abuses which frequently attend its exercise in the heat of political passion—than to limit it at the possible loss of our constitutional liberties. That right would be restricted at the expense of good government if, for instance, in a community where a political party had fallen into disrepute on account of evil practices, one could be held generally liable in damages to another for saying of him that he is affiliated with, or a member of, that party.

> "A further necessity for this rule is, that in many sections of the country—as is well known—a political party may be held in low esteem, because of prejudice, tradition or other equally unworthy reason, so that membership therein may expose one to contempt, hatred or ridicule; whereas in other sections the same political party may enjoy public favor and confidence. Should we, in the former situation, subject a person to liability for general damages for referring to another as a member of the despised party? The question itself echoes a negative answer."

2. Against this background of societal interest, respondent is contending not merely that the publication should be held actionable, but that it should be held libelous *per se*.

This is one of the harshest measures of liability known to the law. Generally speaking, the law of torts casts upon the injured party the burden of establishing the delict and proving the actual damage. When a statement is held libelous *per se*, however, the real and almost the entire burden of proof is cast upon the defendant, and the plaintiff may recover a judgment in almost any amount guessed by a jury without being required to allege or prove any actual damage. Thus the liability sought to be imposed is presumptive, and the penalty sought to be exacted is peculiarly grievous because incapable of even approximate admeasurement before the event.

These severities are pushed to the extreme in a case where the issue is whether a man does or does not have a certain state of mind or subscribe to a given belief or opinion. It is recognized that such an issue is especially difficult to resolve in a courtroom, and may in many cases lie altogether beyond the possibility of rational resolution. *Cf.* Brandeis, *J.*, *dissenting* in *Pierce* v. *United States*, 252 U. S. 239, 253; *Mayrant* v. *Richardson*, 1 N. & McC. (S. C.) 347, 350; *Snavely* v. *Booth*, 36 Del. 378. There is inherent difficulty in defining terms and thereby delimiting

the issues to be tried. For example, what precisely is meant by "prejudice" or "bias" or "Red" or "Fascist"? What degree of bias is conveyed by the expression "anti-Jewish" or "pro-Jewish," "anti-Polish" or "pro-Polish"? Is a charge of "indifference" to Jews or Poles a charge of prejudice in some degree? What percentage of hate or love makes one an "anti" or a "pro"? But, assuming a sound and practical definition of the opinion or belief which has been imputed, the question whether a man adheres to it would almost always involve a series of inferences from likes and dislikes, inclinations and disinclinations, affections and disaffections—a shadowland in which no one can assay the truth but the plaintiff, and sometimes not even he. This is, then, a situation in which extraordinary and presumptive liability for words has no proper place. See Judge CLARK's dissent, R. 33; *O'Connell* v. *Press Pub. Co.*, 214 N. Y. 352, 358.[3]

3. The law of libel takes account of the relative positions and capacities of plaintiff and defendant in the incessant battle of words. Thus the greater liberality allowed in discussion of acts and attitudes of public officials—a liberality characteristic of all common law jurisdictions—finds partial justification in the officials' readier resort to the press and other instruments of assault and defense, and their protected legal position in respect to their own official utterances (*supra*, pp. 14-15).

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[3] In the cited case, the court said: "It was not in and of itself libelous unless the language as a whole, considered in its ordinary meaning, naturally and proximately was so injurious to the plaintiff that the court will presume, without any proof, that his reputation or credit has been thereby impaired." Imputations of state of mind or opinion are inherently so vague and indefinite as to fall short of satisfying any such requirement. See the reference to the *O'Connell* policy in a case holding charges of "Fascism," etc., to be not libelous *per se*, *McAuliffe* v. *Local Union No.* 3, 29 N. Y. Supp. (2d) 963 (Sup. Ct.).

The law similarly takes account of the relative capacities of various types of utterances to get themselves heard. We have seen that "group libels" are not actionable in New York—a rule bottomed upon the public interest in full expression on matters of public concern.[4] The law thus suffers the bigots and merchants of hatred, and that they have taken advantage of this legal immunity is well known. But plainly the law grants this immunity only on the assumption that there shall be a great measure of freedom of reply and rebuttal. The decision under review would in practice destroy the right of reply, thus abandoning the field to the depredations of the bigots. Judge CLARK apprehended the danger inherent in the majority's decision when he said that with intolerance rife in the country, "we must not take the naive view that what ought to be is, and that whoever suggests the contrary is a slanderer; for if we do so, we shut off all healthy criticism of prejudice and allow bigotry full scope to act with impunity" (R. 32). The same danger was seemingly apprehended by the District Court when it spoke of the unhappy prevalence of racial and other intolerance (R. 21-22), which must be combatted by the free use of words.

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[4] In *People* v. *Edmondson*, 168 Misc. at 154, Judge WALLACE said in justification of the rule: "We must suffer the demagogue and the charlatan in order to make certain that we do not limit or restrain the honest commentator on public affairs." In *Ryckman* v. *Delavan*, 25 Wend. (N. Y.) at 199, Senator VERPLANCK said: "The principle upon which the civil remedy is allowed, does not apply here [a case of group libel]; and the great interests of society require that it should not be made to apply. It is far better for the public welfare that some occasional consequential injury to an individual, arising from general censure of his profession, his party, or his sect, should go without remedy, than that free discussion on the great questions of politics, or morals, or faith, should be checked by the dread of embittered and boundless litigation."

The foregoing will show that the majority imposed a maximum inhibition (2, *supra*) in a field where the interest of society demands a maximum of freedom (1 and 3, *supra*). This is the measure of the whole case.

(B) Current *Mores* an Index of Decision

The majority proceeds to its decision without any regard to whether the kinds of expression held by it to be libelous *per se* are commonly or rarely used in debate on public issues as carried on today.

Everyone knows that the kinds of expression so inhibited are in fact very commonly used in debate on public questions. Judge CLARK noted that the majority's rationale would "take in comments found day after day in the most conservative newspapers" (R. 32). In the petition for rehearing a random collection of statements was culled from current issues of newspapers and magazines, each one of which would be libelous *per se* under the rule announced below; we have added another sampling in the Appendix to this brief (*infra*, p. 49 ff.). We suggest that no issue of any newspaper, even the most dignified and cautious, is free of such statements: people are constantly being charged with entertaining unpopular views—this is one of the most familiar techniques of public argument.

What inferences should the majority have drawn from these homely facts? It should have inferred, first, that the law declared by it was at least "new law," as stated by Judge CLARK, and was probably contrary to the existing law of the State—for it is not to be lightly assumed that common practice is against current law.

But common practice affords more than an empirical indication of what the law is. At least in the field of libel, it is a strong indication of what the law ought to be.

From the proposition that the law of libel is not designed, and should not be permitted measurably to inter-

fere with freedom of expression on matters of public concern, it follows that the courts will not and should not undertake to impose severe sanctions on the kinds of utterance on such matters which, at the time of decision, are known to be flowing in great numbers into the marketplace of thought. For courts have no better means of apprehending what latitude is practically needed for the healthful exercise of the right of free speech than to observe what latitude is being availed of, currently, by writers and publishers. This reference to popular *mores* has shaped the law of libel from the beginning, and has accounted in part for its gradual transformation. By keeping its ear to the ground in this fashion, the law does not abandon its claim to assert itself as a moral force; on the contrary, it yields to widespread public habits of expression precisely because that is a means toward preserving freedom of speech, which the law chooses to consider a high moral good.

The decision under review abruptly encumbers and embarrasses with a threat of presumptive liability an enormous area of active expression on matters of general concern. The least that may be said is that respect for freedom of speech should have inclined the court against such a holding unless it was required by the unmistakable imperative of State cases and State policy. By no stretch of the imagination can it be said that such is the condition of State law or State policy.

POINT III

The decision under review is repugnant to constitutional guarantees and should accordingly be reversed irrespective of the condition of State decisional law.

(A) Practical Effect of Decision Below

We have seen that the "new law" created by the Circuit Court of Appeals would render presumptively actionable the imputation to a public official of any belief on a public matter, provided only the belief strikes the court as one which some respectable people would regard with distaste. While the court has not excluded the defense of truth (or the substantially equivalent defense of fair comment on facts truly stated), it is plain that the nature of the prohibited utterances is such that they would not be capable of legal proof in at least many instances, and that in very many if not in all instances proof of truth under common law rules of evidence would be difficult in the extreme (pp. 26-27, *supra*).[1] But if the defendant could not prove his statement by legal evidence to the satisfaction of both the court and a jury, the public official would become entitled to damages even if he had suffered no actual injury, and damages in such punitive amount as a jury might see fit to assess.

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[1] Judge CLARK said: "I do not think it an adequate answer to such a threat against public comment, which seems to me necessary if democratic processes are to function, to say that it applies only to false statements. For this is comment and inference, as the *Tanzer* case suggests, and hence not a matter of explicit proof or disproof. The public official will always regard himself as not bigoted, and will so testify, sincerely enough. And then the burden of proving the truth of the defense will rest upon the commentator, who must sustain the burden of showing his inference true. If he fails in even a minority of the suits against him—as the sporting element in trials to juries susceptible to varying shades of local opinion would make probable—he is taught his lesson, and a serious brake upon free discussion established" (R. 33).

What the decision thus means in practical effect is that comment on matters of public interest and particularly on public officials is now—of all times in American history—to become a dangerous thing. The rule is one of "caveat commentator." To impute to an official an unpopular opinion or belief—unpopular in any given community—would expose the commentator to the "sporting element" of jury trials and punitive liability. Americans have not yet reached the beatific state in which argument can proceed without invective, and words have potentiality for fast travel and wide dissemination. What belief on any acute political or social problem is not today viewed with distaste in some communities in the United States? Shall such words as "appeaser," "pacifist," "warmonger," "fellow traveller," "Red," "Bolshevik," "Nazi-sympathizer," "Negro-hater," "Negro-lover," "Jew-hater," "Jew-lover," "pro-union," "anti-union," "Papist," "anti-Papist," "Know-Nothing," "anti-Know Nothing," "Fundamentalist," "anti-Fundamentalist," "radical," "reactionary," and the thousands of other characterizations that have filled and now fill our daily press in all sections of the country, be eliminated from the vocabulary of the polemicist or used only at the risk of reprisal in the courts—and that by public officials who themselves enjoy extraordinary immunities for their own often equally intemperate utterances, and ready access to means of self-defense (including, in the case of a Congressman, the government-subsidized franking privilege)?

The right to criticize our rulers distinguishes our way of life from that of the dictatorships; it is our major corrective and without it the democratic mode is impossible. We submit that the decision below so far limits and restricts that right as to offend against constitutional guarantees.

(B) Freedom of the Press and Due Process of Law

A State statute, embodying *in haec verba* the rule of the case as declared by the Circuit Court of Appeals, would, we think, be invalid under the free press, and both the "property" and "liberty" features of the due process clauses, of the State and Federal Constitutions.

1. These guarantees bespeak more than a prohibition of "previous restraints"; a statute imposing subsequent punishment which has the effect of trammelling or embarrassing unduly the expression of views on matters of public interest is likewise unconstitutional. *Thornhill* v. *Alabama,* 310 U. S. 88; *Cantwell* v. *Connecticut,* 310 U. S. 296, 307. And it can make no constitutional difference that the penalty in question is imposed through processes denominated civil rather than criminal. *Cf. Near* v. *Minnesota,* 283 U. S. 697. For in respect to the seriousness of the threat to free expression, the restrictive effect on the communication of ideas, and the penalty in prospect or actually imposed, civil liability is not less and may well be more grievous than liability for a fine. See Holmes, Collected Legal Papers, pp. 173-4. Be it noted that Congressman Sweeney asks damages of $250,000 in the present case (R. 5) and he instituted seventy-four other actions based on the same or substantially the same column.

2. A rule limiting expression is to be tested for constitutional purposes not only in the light of its impact on the particular state of facts arising for decision but "upon its face," that is, in the light of the generality of cases which may arise under it. Proof of an abuse of power in the particular case is not a requisite for attack on the validity of the rule, whether of previous restraint or subsequent punishment. *Thornhill* v. *Alabama, supra,* pp. 96-98; *Hague* v. *C. I. O.,* 307 U. S. 496, 516. It is thus appropriate to consider the enormous area of expression which becomes at least "hazardous" (R. 32) under the new rule of liability.

3. The essential vagueness of the rule adds immeasurably to the hazard and to the implicit restraint, and is a further index of invalidity. *Cantwell* v. *Connecticut, supra,* p. 308; *Bridges* v. *California,* ..... U. S. ....., ..., 86 L. Ed. 149, 152.[2]

4. In applying the constitutional provisions to the case at bar, the Court will recognize that they "must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow" (*Bridges* v. *California, supra,* p. 153); that they were intended to prohibit restrictions "that cramp the feeling of freedom in the use of tongue or pen regardless of the temper or the truth of what may be uttered" (dissenting opinion, *id.,* p. 168). Above all it is vital to remember that here—as in few if any cases in which like constitutional questions have arisen—the "substantive evil" alleged to justify the restriction on utterance is not a possibility of disorder or breach of the peace or disruption of the courts, in which the State has a real and pressing interest; it is merely the possibility of an intrusion on personal comfort —against which is ranged the interest of society in free debate on matters of public importance.

The relevance of these contentions is disputed by respondent on the ground that, as libels are traditionally punishable despite the free press and due process provisions, a holding that a class of statements is libelous can raise no fundamental question (Br. Opposing Cert. 17-19).

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[2] As Judge CLARK said, "And the making of fine distinctions in rationale is indicated by the implication that a comment suggesting plaintiff's objection to the judicial candidate for his foreign birth alone would have been proper. Of course, the uncertain threat of suit, invited by a rule at once so vague and so extensive, is a restriction on freedom of the press almost as direct as a rule of clear liability" (R. 32-33).

But if the reciprocal relation between libel and free speech is apprehended (*supra*, p. 24), it becomes clear that a situation may undoubtedly be met where expansion of the range of libel must be held unduly to restrict the permissible range of free speech; and the question is only one of where the line should be drawn. Indeed, much of the history of free speech in England and the United States is a history of successive limitations on the scope of criminal libel; and that this case involves an issue of civil libel is not a difference of "constitutional dimension."

Further, unless the nexus between libel and free speech is as we have described it, the decisions of this Court protecting the right of utterance may be rendered meaningless by manipulation of the law of libel. To cite one instance: Of what avail are the decisions of this Court safeguarding picketing as a constitutional right,[3] if a legend on a picket sign "Do Your Part! Buy Where You Can Work! No Negroes Employed Here!"[4] may be held libelous *per se* as an imputation to the employer of anti-Negro prejudice, as under the decision at bar it would be? The Court should not, we submit, tolerate any such evasion of doctrine deliberately pronounced. See *United States* v. *Hutcheson*, 312 U. S. 219, 236.[5]

(C) Privileges and Immunities Clause of the Fourteenth Amendment

A further constitutional provision—the privileges and immunities clause of Section 1 of the Fourteenth Amendment—is pertinent here. The utterance involved related

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[3] *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468, 478; *Thornhill* v. *Alabama*, *supra*; *American Federation of Labor* v. *Swing*, 312 U. S. 321.

[4] See *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552, 557.

[5] In *American Federation of Labor* v. *Swing*, *supra*, the State court granted its injunction, vacated by this Court, in part on the ground that the picketing had included the dissemination of libelous statements about the employer.

to a National legislator in a matter of National importance. That the discussion of National affairs is a right which must lie within the coverage of the privileges and immunities clause is clear from *Hague* v. *C. I. O., supra,* pp. 512, 522, 532. See *United States* v. *Cruikshank,* 92 U. S. 542, 552-3; *Edwards* v. *California,* 314 U. S. 160, 181. Mr. Justice BRANDEIS had said, *dissenting* in *Gilbert* v. *Minnesota,* 254 U. S. 325, 337-8:

> "The right to speak freely concerning functions of the Federal government is a privilege or immunity of every citizen of the United States, which, even before the adoption of the 14th Amendment, a state was powerless to curtail. It was held in *Crandall* v. *Nevada,* 6 Wall. 35, 44, that the United States has the power to call to the seat of government or elsewhere any citizen to aid it in the conduct of public affairs; that every citizen has the correlative right to go there or anywhere in the pursuit of public or private business; and that 'no power can exist in a state to obstruct this right which would not enable it to defeat the purpose for which the government was established.' The right of a citizen of the United States to take part, for his own or the country's benefit, in the making of Federal laws and in the conduct of the government, necessarily includes the right to speak or write about them; to endeavor to make his own opinion concerning laws existing or contemplated prevail; and, to this end, to teach the truth as he sees it. Were this not so 'the right of the people to assemble for the purpose of petitioning Congress for a redress of grievance or for anything else connected with the powers or duties of the national government' would be a right totally without substance. See *United States* v. *Cruikshank,* 92 U. S. 542, 552; *Slaughter-House Cases,* 16 Wall. 36, 79."

It cannot be doubted, we think, that a State statute measurably interfering, through imposition of presumptive civil, or criminal liability, with the right to petition National officials for a redress of grievances, would be invalid under the privileges and immunities clause; as would a

State statute destroying the traditional immunity of National officials from prosecution or civil suit for libel based on their official utterances. The practice of petitioning for redress of grievances has fallen into disuse; in a modern world the equivalent is the newspaper editorial and the commentator's animadversion on National affairs. And the right of a National official to speak freely on public matters is not more important than, nor fundamentally different from the right of a private person to speak freely in criticism of the acts and attitudes of National officials. In this field the Constitution compels a National pattern of freedom beyond the inhibitions of State statute.[6]

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[6] The privileges and immunities secured by the clause are those of "citizens of the United States." Therefore it has been said that the benefits of the clause are confined to natural persons. *Hague* v. *C. I. O., supra,* p. 514. The same approach was taken, in the concurring opinion in the same case, to the coverage of the "liberty" phase of the due process clause. *Id.,* p. 527; and see *Western Turf Assn.* v. *Greenberg,* 204 U. S. 359, 363, where both problems are treated *in pari materia.* But from that part of *Bridges* v. *California, supra,* as to which the Court was in agreement, it appears that the "liberty" phase of the due process clause is now conceived to cover corporations; and a like position is foreshadowed under the privileges and immunities clause. The Court is doubtless conscious of the fact that newspapers and other great media of expression are predominantly owned by corporations; hence restrictive interpretation in either context would involve serious perils to a free press. Moreover, the rights involved, although asserted by a corporation-publisher, realistically include the rights of the author and especially of the reading public, who are natural persons and presumably for the most part American citizens; the corporation is merely a conduit. *Cf. Truax* v. *Raich,* 239 U. S. 33. A holding that a corporation is entitled to some at least of the privileges and immunities under Section 1 of the Fourteenth Amendment involves less conceptual difficulty than the doctrine that a corporation is a citizen within Article III, Section 2—originally evolved by way of a "presumption" that a corporation represented the persons composing it and that all those persons were citizens of the State which chartered the corporation. See *Barrow S. S. Co.* v. *Kane,* 170 U. S. 100, 106.

(D) Special Circumstances of the Present Case

What has been said exposes the constitutional infirmities of the rule of law under attack, even had that rule been embodied in State statute. But the constitutional infirmities are stressed and aggravated by the fact that the rule was (1) declared by a court and not a legislature, and (2) by a Federal court purporting to declare State law.

1. A judge-made rule of substance, like a statute, is an act of the State (or the Nation) within the ambit of the constitutional prohibitions; this doctrine has been evolved in the very field of free speech. *American Fed. of Labor* v. *Swing*, 312 U. S. 321. Moreover, it has been forcefully pointed out that a judge-made rule intrinsically involves greater hazards to the constitutional guarantees than a statutory rule, because defined with less precision. *Cantwell* v. *Connecticut, supra*, p. 308. And this Court has rightly accorded less weight to judicial declarations of policy inhibiting free speech than to legislative declarations of policy looking in the same direction. The language of Mr. Justice BLACK in *Bridges* v. *California, supra*, p. 152 (to which, we take it, the minority of the Court would not take exception), is directly pertinent here:

> "It is to be noted at once that we have no direction by the legislature of California that publications outside the court room which comment upon a pending case in a specified manner should be punishable. As we said in *Cantwell* v. *Connecticut*, 310 U. S. 296, 307, 308, such a 'declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations.' But as we also said there, the problem is different where 'the judgment is based on a common law concept of the most general and undefined nature.' *Id.* 308. *Cf. Herndon* v. *Lowry*, 301 U. S. 242, 261-264. For here the legislature of California has not appraised a particular kind of situation and found a specific danger sufficiently imminent to justify a restriction on a particular kind

of utterance. The judgments below, therefore, do not come to us encased in the armor wrought by prior legislative deliberation. Under such circumstances, this Court has said that 'it must necessarily be found, as an original question' that the specified publications involved created 'such likelihood of bringing about the substantive evil as to deprive [them] of the constitutional protection.' *Gitlow* v. *New York*, 268 U. S. 652, 671."

2. In the case at bar the rule of law is not even encased in the less-than-armor of deliberate consideration by a State court. It is the judgment of a Federal court, not responsive to the will of the people of the State, purporting to apply State law, but in fact creating new doctrine on the insecure basis of general definitions. We have, therefore, no true judgment of any agency of the State that the inhibitions of the rule are needed to subserve any interest which the State thinks it necessary or wise to protect. On the contrary, we have shown above by reference to decisions of the State courts that their views of policy are quite different from those apparently entertained by a majority of the Circuit Court of Appeals.[7]

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[7] It is proper to add that whereas it is one of the vices of the rule declared by the court below that it is vague and therefore indefinitely extensible, this Court's reversal on constitutional grounds need not imply an indefinite limitation on the power of the States. The Court's ruling may for the present be confined to a denial of the power of the States to impose (a) the sanction of presumptive liability upon a statement concerning (b) an official, or, alternatively, a National official, which imputes to him (c) a state of mind or opinion on (d) a matter of public importance.

POINT IV

The publication at bar, properly interpreted, does not accuse respondent of racial or religious intolerance, and is therefore not libelous *per se* on any theory.

We have thus far assumed, with the court below, that the article is to be interpreted as charging respondent with intolerance of Jews or foreign-born Jews. We now urge that properly interpreted the article does not charge such intolerance.

If the statement in the article to the effect that respondent was associated with Father Coughlin is shorn of an invidious implication which the court was not authorized to make (see *infra*), the article amounts merely to an assertion that the Congressman was publicly (not stealthily) urging the race, religion and/or foreign birth of a particular person, Freed, as reason for his being denied the endorsement of Ohio Representatives for appointment to a particular office, that of District Judge. From this it could be inferred, at most, that the Congressman was of the opinion that the race, religion or foreign birth of candidates should have a bearing, or in given cases a conclusive bearing, upon their selection by the President for service on the bench. It cannot be seriously suggested that to impute such a belief to a Congressman is libelous *per se*. For such a belief finds justification in respectable ideas widely held and commonly acted upon; the idea, for example, that judicial personnel should in some sort reflect the numerical or voting strength of the various racial, religious or social (as well as political and geographical) sectors of the community, or, put another way, that it is not sound policy for any one of such sectors to obtain disproportionate representation on the bench. (Jews have not infrequently opposed Jews for judicial and other public offices on precisely these grounds.)

At least two errors—one an obvious error of law, the other an error of misdirected compassion toward minority groups—appear to account for the court's failure to adopt the interpretation of the article just presented.

1. The error of law lies in the court's assumption, apparently as a matter of judicial notice, that Father Coughlin is an anti-Semite, from which it proceeded to infer that the statement that respondent was "chief congressional spokesman of Father Coughlin" (paragraph 3 of publication, R. 3) was in effect a charge of anti-Semitism.[1] Thus Judge CHASE said, "The false statements published concerning him [respondent] neither separately nor together make him out to be a character more offensive to right-thinking people than he would be as the spokesman in Congress of Father Coughlin; who opposed the appointment of a man named Freed," etc. (R. 29).

It was, of course, altogether improper for the court to make any such assumption as to Father Coughlin. If it was respondent's position that the charge of association with Father Coughlin was implicitly a charge of anti-Semitism because Father Coughlin is an anti-Semite, he should have pleaded this matter in his complaint as an "extrinsic fact," in which case it is established under New York law that he would also have been compelled to plead special damages, which he did not do. *O'Connell* v. *Press Pub. Co.*, 214 N. Y. 352; *Crashley* v. *Press Pub. Co.*, 179 N. Y. 27; *McNamara* v. *Goldan*, 194 N. Y. 315, 321.

It is noteworthy that in the only other reasoned opinions holding for respondent on motions to dismiss, *viz.*, the two opinions by Judge HOLLY in the District Court for Northern Illinois, Eastern Division, the same erroneous

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[1] Judge ALLRED in *Sweeney* v. *Caller-Times Pub. Co.*, 41 F. Supp. 163, 166, refusing to follow the decision of the Circuit Court of Appeals herein, said that that court "seemingly regarded as most libelous the statement that Sweeney was the spokesman in Congress of Father Coughlin * * *."

assumption was made. Judge HOLLY referred to Father Coughlin as a "bitter and vicious" anti-Semite (*Sweeney* v. *Joliet Printing Co.*, No. 1204), and again as "a demagogue who is stirring up racial and religious antagonisms" (*Sweeney* v. *Illinois Pub. & Print. Co.*, No. 1201).[2]

2. What we have, with all deference to the court, called an error of misdirected compassion, appears also to have contributed to the court's leap from the statement that respondent opposed Freed for public office because he was a Jew or a foreign-born Jew, to the superimposed interpretation that respondent was charged with being intolerant of the whole class of Jews or foreign-born Jews. Although, under the rationale of the decision below, it would now be equally libelous to say of respondent that he opposed Freed for office because he was a Yankee, a Southerner, or of English extraction, it is hardly likely that, had such a case been first presented to the court, it would have been as quick to infer that the statement betokened prejudice against the whole class of Yankees, Southerners or persons of English extraction; the court would probably have inferred that respondent was simply advancing a conventional political argument against a particular political appointment. What is the distinction between the case at bar and the hypothetical case? The distinction is that Jews are a small minority, while the other classes have considerable numerical strength. But in the context of the present case this distinction is emotional, not rational. Rationally considered, an implica-

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[2] The majority made a further mistake in analysis. Even if a charge of opposition to Freed could be construed as a charge of prejudice, it was certainly no more than a charge of prejudice on one occasion. Recognizing that no human being is exempt from a sporadic lapse of judgment or of diligence or care, the courts of New York have held that a charge of a single misstep or a single neglect of duty is rarely if ever libelous *per se*. *Twiggar* v. *Ossining Print. & Pub. Co.*, 161 App. Div. 718; *Church* v. *Tribune Assn.*, 135 App. Div. 30.

tion of prejudice against a large class may well carry a greater potentiality of libel than an implication of prejudice against a small class, since the hurt to the plaintiff is presumably greater. On the emotional side, however, the latter case makes a stronger, albeit a deceptive, appeal to the court. The majority apparently supposed that, by being quick to infer anti-Semitism from statements in themselves innocuous, and then branding anti-Semitism as so horrendous that a charge thereof must be held libelous *per se*, it was assisting a weak minority. But we have shown that, far from assisting weak minorities, the decision below deals an especially hard blow at them by rendering criticism of bigots and bigotry at least "hazardous" (*supra*, p. 28; R. 32-33).

Other courts which have been called upon to examine the question have refused to fall into the errors above noted.

They have recognized, first, that opposition to particular candidates for office on the ground of nationality, race, religion and the like is not inherently so unreasonable as to point to prejudice; second, that, whether or not unreasonable, it is in fact so common that to brand a charge thereof as libelous *per se* would be but an unreal gesture.

We venture to say that there are few people who have not given consideration to factors of race, religion, etc., in the matter of political appointments, without thereby exhibiting prejudice or at any rate more than the touch of prejudice that is ineradicable from even the best of human minds. The notion that merit alone should dictate political appointments and that anyone who thinks otherwise on any particular occasion is a prejudiced rascal, is, indeed, neatly contradicted by a review of the qualifications which Congress has itself established by statute through the years for the holding of various Federal offices. Some of the pertinent statutes are brought together in the dissenting opinion of Mr. Justice Brandeis in *Myers* v. *United States*, 272 U. S. 52, 240.

Attention has already been directed to the opinion of the District Court, where these considerations are touched upon (R. 15, 21-22).

Chief Justice GREEN said in *Sweeney* v. *Newspaper Printing Corp.*, 177 Tenn. 196, 199-200:

> "The language printed indicates that plaintiff's opposition to Mr. Freed's appointment to the bench was based not only on the fact that Freed was a Jew but because he was born in Hungary, did not come to the United States until he was thirteen years old, and was not naturalized until ten years later.
>
> "It does not seem to us that the opposition of a Congressman to the selection of a Federal District Judge on either of these grounds necessarily reflects on the personal, professional, or official character of that Congressman.
>
> "A member of the House of Representatives has no part in the selection of a federal judge, either by way of appointment or confirmation. The most that he can do is to recommend. It appears that the plaintiff is a Democrat. If for reasons purely political he opposed the appointment of a foreign-born citizen, or a Jew, or a Catholic, or a Protestant to the federal bench, such action would not indicate personal, professional, or official delinquency.
>
> "It has always been customary, so far as we know, for the President himself, who appoints the judges, all applicants being qualified, to be influenced by the political effect of the particular selection he makes. Under such circumstances, we have heard of no criticism of any President on this account. Naturally interpreted, at most, the charge here is that for political reasons plaintiff opposed the appointment of a particular man as federal judge, on account of the religion or nativity of that man. We are unable to see that the charge could be regarded as libelous *per se*, there being other qualified applicants for the office.
>
> "The plaintiff, without any vestige of personal race or religious prejudice, might have opposed the appointment of Mr. Freed to the federal bench as a matter of party policy. Such action on his part would

not be reprehensible in a government ruled by political parties, other capable men being available for the position."

And similarly the Ohio Court of Appeals said in *Sweeney* v. *The Beacon Journal Pub. Co.*, 66 Ohio App. 475, 480-1, *app. dism.*, 138 Ohio St. 330:

"It does not seem to us that the opposition of a congressman to the appointment of a person to high public office by the President of the United States for the reason that he is a foreign-born Jew constitutes a violation of the moral code or the laws of the land. Nor does it seem that if a congressman acts as a spokesman for a priest in the Catholic Church he is guilty of such delinquencies.

"If the plaintiff's claims can be sustained, then it can be said of the framers of the Constitution of the United States that they violated the moral code when they advocated the enactment of Article II, Section 1, of the Constitution of the United States, which provides in part that 'No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President' of the United States; or of Article I, Sections 2 and 3, of the Constitution, which in part provide that no person shall be a representative to Congress who has not been for seven years a citizen of the United States, nor a senator unless he has been a citizen for nine years.

"It is common knowledge that political appointments are greatly influenced by the political effect of the appointments. And it is common practice to appoint, to various offices, persons who are representative of different nationalities, creeds and groups. To oppose a person for political reasons because he is a Methodist, a Baptist, a Catholic, a Jew, or one foreign born, for a particular appointment, does not carry the necessary implication that the person opposing is influenced by his own intolerance, any more so than does opposition to a qualified person because he is of some other political party, or is in the declining years of his life, or favors prohibition, or is of

socialistic tendencies or has had capitalistic connections. It might be said under these circumstances that the person charged with such utterances was deprived of the 'respect, confidence and esteem' of the thousands of honest citizens who come within such classification."

POINT V

The judgment of the Circuit Court of Appeals should be reversed and the judgment of the District Court reinstated.

There is no question in the case of which general body of law is applicable. All the judges who acted in the matter below recognized that the decisional law of New York was applicable and they all sought to find and apply that law. This Court has before it two contrary findings of State law—that of the dissenting judge in the Circuit Court of Appeals confirming the analysis made by the District Court, and that of the majority of the Circuit Court of Appeals. On an objective showing that the former finding is correct and the latter incorrect, this Court should reinstate the judgment of the District Court.

Contrasting methodologies in finding State law are also fully exposed in the opinions below and call for final choice by this Court.

1. The majority purported to follow authority in the New York Court of Appeals but, as we have seen, it merely rehearsed a form of words contained in those cases which affords scant if any guide to actual decision. The true effect of the holdings of cases in the Court of Appeals as well as in the lower courts, marking out the particularly pertinent rules, was disregarded by the majority but observed by the District Court and the dissenting Judge. Of course the Rules of Decision Act requires that

greater weight should attach to the holdings of State cases than to mere language in opinions having at most the authority of *dicta*.[1] Compare the technique employed by this Court in finding State law in, *e. g.*, *Texarkana* v. *Arkansas L. Gas. Co.*, 306 U. S. 188.

2. While citing cases in the Court of Appeals, the majority thought it doubtful whether the publication at bar was libelous *per se* within those authorities (R. 30). If it believed that the highest court of the State had not conclusively settled the question, the Federal court was bound to look to pertinent decisions of the lower State courts. *West* v. *American Tel. & Tel. Co.*, 311 U. S. 223; *Stoner* v. *New York Life Ins. Co.*, 311 U. S. 464; *Six Companies* v. *Joint Highway Dist.*, 311 U. S. 180; *Fidelity Union T. Co.* v. *Field*, 311 U. S. 169; see *Russell* v. *Todd*, 309 U. S. 280, 293. This the majority failed to do. The dissenting judge and the District Court, on the other hand, accorded weight to the decisions of lower courts in combination with authority in the highest State court.

3. If the particular decisions were not dispositive, the majority should have sought the solution of the problem in the basic principles and policies underlying the law of libel in New York and the law of libel prevailing generally. There is obviously no escape from the obligation to consider such fundamentals unless the search for State law under the Rules of Decision Act is to become a sterile exercise possibly more objectionable than the practice overturned in *Erie Railroad Co.* v. *Tompkins*. In the same connection we point to the majority's failure to give due weight to provisions of either the State or Federal constitutions even as significant indications of policy. On the other hand, the District Court and the dissenting Judge exhibited a clear appreciation of such underlying conceptions.

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[1] *Cf.* Corbin, *The Laws of the Several States* (1941) 50 Yale L. J. 762.

As the judgment of the District Court represents the law of New York as it must be, and has actually been found to obtain by pursuit of a proper methodology under the Rules of Decision Act, it should be reinstated.

With equal force we urge that irrespective of the decisional law of New York, the judgment of the District Court should be reinstated as the only one compatible with constitutional standards.

Respectfully submitted,

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Appendix

Judge CLARK observed that the press of the day abounds with statements which would be held libelous *per se* under the rationale of the decision below (R. 32).

Following are some statements culled from New York City newspapers of a single day selected at random, Monday, February 9, 1942:

"This opposition is not even Republican. It is an opposition that plans to use the Republican machinery. There are many party Democrats in it, and there are Fascist circles behind it. It has a press—the Hearst, McCormick, Patterson (Daily News) press. It has pamphlets and minor papers that reach the rabble; Social Justice, Roll Call, news letters, and innumerable other means of spreading pro-Fascist propaganda. It has a plan: To secure the re-election of the kill-Roosevelt crowd and of all the isolationists. It intends to create a solid and active minority whose purpose will be to paralyze all action and to use every internal confusion and external defeat to render the country incapable of an active pursuit of the war . . . and prevent a United Nations conduct of the war, by demanding an exclusively American control of the war, which seems to be very patriotic, but would be disastrous. And they wish this American control in order to control the disposition of the United Nations armed forces."

Post, p. 9

"Chairman Flynn of the Democratic National Committee has interpreted and distorted national unity in war to mean suppression of political opposition. . . .

"It is to be wondered if Mr. Flynn is seeking national unity, or PERPETUATION OF POWER."

Journal-American, p. 12

"'You know the law department [of the City] has refused to use a No. 2 candidate on the [civil service] list because he was a Negro,' Kern charged further."

World Telegram, p. 7

"Last Fall U. S. officials in these countries informed the department that Nazi agents were distributing pro-Jap pamphlets in English and native languages, evidently written by an American. A

check-up disclosed, it is charged, that the writer was Ralph Townsend, an editor of Scribner's Commentator."

Daily Mirror, p. 19

"According to testimony which will be presented, Frederick V. Williams, Pacific coast newspaperman, not only was the correspondent of the Japanese Times and Mail of Tokio, but also was making pro-Jap speeches before many organizations."

Daily Mirror, p. 19

". . . Ben Hecht, the drama critic-hater. . . ."

Daily News, p. 28

"Lescohier was the [radio] program's No. 1 labor baiter."

PM, p. 24

"WHEELER'S STILL AN ISOLATIONIST."

PM, p. 13

And following are statements taken from an issue of *The Nation* (February 14, 1942) and an issue of the *New Republic* (February 16, 1942):

". . . R. J. Thomas, president of the United Automobile Workers, placed the blame for the delay in shifting to all-out war production primarily upon the shoulders of Knudsen, who he declared has represented the automobile industry and not the people of the country in his service at Washington. . . . the isolationist press, which consists mainly of newspapers owned by William Randolph Hearst, Joseph M. Patterson, and Robert R. McCormick. . ."

"The Shape of Things," *The Nation*, p. 182.

"But in the case of Jesse Jones, personality is closely integrated with policy. The kind of a man he is explains . . . why his policies have been sterile in peace time, ruinous in war time. . . . His scorn for theorists, intellectuals, and such odd fish is huge. . . . he combines provincial small-town conservatism with a dislike for 'Wall Street.' . . . Jones can be depended on to stand firm with the Street on any crucial issue. . . .

Appendix

"The fourth base of Jesse Jones's power is his control of the RFC. In his nine years as chairman he has built a bureaucratic hierarchy which has no parallel in Washington. . . . It has been years since Jones has bothered to attend an RFC board meeting; he knows there will be no shadow of disagreement since he has decided everything in advance himself. Jones took care to see that the recalcitrant Emil Schram's successor as RFC chairman was a sixty-eight-year old Democratic politician named Charles B. Henderson, who gives the impression he will stand without hitching. . . .

"Throughout these articles I have called Jones a 'state-capitalist,' . . . What we see in the RFC is a combination of the vices of private capitalism and state bureaucracy. . . . The RFC and the other government corporations under Jones's control have been run in the most bureaucratic and dictatorial manner, and their policies have had the effect of strengthening all that is undemocratic in our economic system. A shift of power toward state capitalism of this kind cannot be called an advance toward democracy. It is true that Jones himself is a conservative and not a potential fascist. But his policies, by blocking the road to any democratic solution of our social and economic war problems, are making straight the path of some future native totalitarian movement."

"Jesse Jones, Reluctant Dragon," *The Nation*, p. 190

"THE NAZI BUND of New Hyde Park, Long Island, a center of pro-fascist and Coughlinite activity, has become the New York Park Fishing and Hunting Club."

"In the Wind," *The Nation*, p. 193

"Third, his treatment of the reaction of the Negro to slavery should destroy forever the prejudiced belief, which was given scientific authority by Sir Harry Johnston, that the Negro, having been fitted by nature for slavery, offered no resistance to enslavement."

Book Review, *The Nation*, p. 196

"Nor is Jim Crow a strictly Southern proposition. New York City maintains four public colleges. . . . No faculty member is a Negro. . . ."

New Republic, p. 221

Appendix

"John Tabor, that arch-reactionary, will take over the Appropriations Committee and use it to drive all liberals out of leading positions in the government agencies. The chairman of the Banking and Currency Committee will be Jesse Wolcott, the leader of the fight to emasculate the price bill. Allen Treadway will run the Ways and Means Committee, taxing the poor and letting the rich go free. The Foreign Affairs Committee, with powers of control over Lease-Lend and Reconstruction, will fall into the outstretched hands of Hamilton Fish. To Fish will also go the Rules Committee, to become the burial ground of all liberal measures.

New Republic, p. 226

"The Sinarchist movement is a Mexican version of the Christian Front. The top man in the movement at present is Salvador Abascal, now organizing the Sinarchist colonizing project in Lower California. Preaching the destruction of democracy, his avowed ideal is a return to the conditions of the thirteenth century. The favorite attack of his newspaper on Cardenas berated the latter's 'Jewish-Masonic convictions.' To Abascal and to his movement even the Church in the United States gives comfort. The Rev. Jerome P. Holland writing in The Tablet, the organ of the Brooklyn diocese (November 8, 1941), assured American Catholics that the Sinarchist movement 'may be described as a movement of the Right, deeply rooted in Catholic spirituality and philosophy, recognizing the evils from which modern society is suffering and proposing practical remedies . . .'

"The remedy, of course, is fascism, preferably clerical; but the important fact to note here is the open support of a movement dedicated to the destruction of democracy and hatred for the United States. Further support for Sinarchism has come from the News Service of the National Catholic Welfare Conference (a voice of the American hierarchy) and from the influential Jesuit weekly in El Paso, Texas, Revista Catolica.

". . . one of the signers was Father Joseph F. Thorning. These demands have already reached our State Department. Needless to say, any surrender on this point could only be construed as a new kind of appeasement—the appeasement of clerical fascism."

New Republic, pp. 232-233

Appendix

"Under the vacillating leadership of Representative Joe Martin of Massachusetts, the Republicans employed their power to obstruct the President's foreign and domestic policies but seldom with sufficient effect to dramatize their opposition. By allying themselves with reactionary Southern Democrats, Republicans beat the President repeatedly on domestic issues. . . .

"There should be a reasonably good chance of cutting off the isolationist limbs on which the war found many members of Congress. To cite an extreme example: how can Representative Hamilton Fish hope to be reelected in the President's home district now that a grand jury has exposed his involvement in the Viereck Verein and his voting record bears public witness to his obstructionism before December 7, and after?"

New Republic, p. 235

Characterizations such as reactionary, radical, pro-Nazi, anti-democratic, Fascist, anti-Catholic, anti-Semitic, anti-Negro, appeaser, isolationist are so common that the most casual survey of almost any segment of the press will turn up thousands of examples. Following is a sampling:

"One of Miss Ingall's letters was to her friend, Catherine Curtis, president of the Women's Executive Committee of America, Inc., a well-known Washington lobbyist for reactionary causes."

World-Telegram, February 12, 1942, p. 10

"Nazi Leaning Laid to Fish"

Post, February 10, 1942, p. 5

"For years most of the general public has watched Mr. Lewis with suspicion and fear. He has been credited with a ruthless appetite for personal power over labor, industry and government. He has been accused of dictatorial acts and ambitions."

World-Telegram, January 26, 1942, p. 12

Appendix

"To the Editor of the Sun—Sir: Joseph P. Lash, the much discussed radical leader of the youth movement, . . ."

N. Y. Sun, January 26, 1942, p. 16

"JAIL MUZZLES FASCIST PELLEY FOR 2 YEARS"

Post, January 21, 1942, p. 5

"LEWIS UNITY PLAN HELD ISOLATIONIST PLOT.

"The double-talk that has characterized the tremulous relationship between him and other CIO officials will be dropped, and his 'peace plan' will be described for what it appears to be, a sell-out by men who can spell 'accouplement,' but who can neither spell, pronounce or understand the meaning of the word 'democracy.'"

Post, January 21, 1942, p. 5

"Nominally Hart is the president of the New York Economic Council, a reactionary business lobby which has fought social reform for two decades . . . Allen Zoll, who at that time led American Patriots, Inc., a Fascist dummy corporation . . . and while *America's* anti-Semitism has been less pronounced than the other Coughlin organs, it has steadily upheld Coughlin in his clashes with critics . . . John B. Trevor, millionaire 'patrioteer' who has been connected with half a dozen pro-Fascist units; John B. Snow, who uses a front called the 'League for Constitutional Government.'"

PM, June 12, 1941, p. 14

"The leaders of the pro-Fascist front have groped for a leader who could unite Coughlinites and professional anti-Catholics, Bundsmen and phony patrioteers, society women and street rowdies. They now believe they have found their man.

"He is Charles A. Lindbergh . . . At a conference attended by George Deatherage, James True, Gen. Van Horn Mosely and other avowed pro-Fascist leaders in 1940, . . . Social Justice has editorially embraced him; so have anti-Catholic tub thumpers like Edward Smythe."

PM, June 12, 1941, p. 21

Appendix

"Father Edward F. Brophy, spiritual adviser of the anti-Semitic, pro-Fascist Christian Front, ducked a debate yesterday because he said the sponsoring group 'Is so pro-British, so pro-Communistic, in being anti-Nazi but not anti-Marxist.' . . . This is the same Father Brophy who has been heard at Joe McWilliams' Jew-baiting meetings and who declared at a Christian Front meeting last July that the Declaration of Independence was 'a Christian document, intended for Christians only.' "

PM, April 28, 1941, p. 5

"Senator Burton K. Wheeler, the appeaser, says he probably will be called an appeaser but he thinks the time has come for a negotiated peace."

PM, April 21, 1941, p. 10

"For Colonel McCormick at 61 may be the least popular U. S. publisher, as well as the most arrogant, contentious and unpredictable . . . That poll reflected the Tribune's savage anti-Roosevelt angling of news. Meantime its isolationist-propaganda-as-news-unsurpassed for furious bias since frontier journalism. . . ."

Time, December 1, 1941, p. 62

"Already the newsstands blossom out with pictures, in various types of ecclesiastical garb and pose, of the fatuously pro-Soviet Very Rev. Dr. Hewlett Johnson, Dean of Canterbury."

"Issues that are Involved in American War Aid to Russia," *America*, September 20, 1941, p. 650

"Catholic diplomat John Cudahy recently blossomed forth as mouthpiece for the Fuehrer."

The Converted Catholic, September 1941, p. 191

"In 1916 Georgia was the most anti-Catholic state in the Union, thanks to Catholic baiter Thomas Watson's attacks."

Time, September 22, 1941, p. 50

"As an American, I can have no part with Lindbergh's anti-Semitism. Allow that cancer of Anti-Jewry to grow, and our country will be destroyed."

"Lindbergh and The Jews," *Liberty Magazine*, January 3, 1941

Appendix

"Joseph P. Kamp, head of the so-called Constitutional Educational League, has written a second booklet exposing the 'Fifth Column' entitled the 'Fifth Column in the South.' It follows the usual Kamp pattern, being generally anti-labor and anti-democratic. But where his first book was anti-Semitic, this is Anti-Negro."

"Democracy and Authoritarianism," *The Protestant Digest,* December - January, 1940 - 1941, p. 44

Following are some suggestive editorial reactions to a single episode, the speech delivered by Charles A. Lindbergh in Des Moines, Iowa, September 11, 1941:

"On Thursday night at Des Moines Mr. Charles A. Lindbergh departed from the American way. For all his circumlocutions, for all his tardy admission that the Nazis' treatment of the Jews could not be condoned, Mr. Lindbergh made an unmistakable appeal to anti-Semitism."

N. Y. Herald Tribune, September 13, 1941

"Charles A. Lindbergh last night made the dirtiest speech he has yet made. For the first time, Lindbergh accused the Jews of trying to get America into the war. For the first time, he came out into the open with the Nazi venom that fits so well with the Nazi medal he has never given up."

PM, September 12, 1941

"If this attack of Lindbergh's on the Jews were merely an isolated instance of his way of thinking, the protests of the America First Committee that it does not constitute anti-Semitism might be listened to with more attention. But the attack follows too closely the tactics of Hitler, fits too snugly into the whole pattern of Fascist thinking to be simply a well intentioned piece of advice to American Jews, the cloak in which it is wrapped."

PM, October 5, 1941

"When Lindbergh came out in the open with his anti-Semitic brutality large numbers of such cooperators began to see the ultimate meaning and danger of such talk."

The Churchman, October 1, 1941

"The raising of the racial issue by Charles A. Lindbergh in his Des Moines, Iowa, speech is the most unfortunate happening that has occurred in the United States since the present tense situation developed.

"The assertion that the Jews are pressing this country into war is unwise, unpatriotic, and un-American. . . .

"But in his Des Moines speech he has done more to incite to hatred, bitterness, and mutual distrust than any other person on either side of this war-or-no-war controversy."

Journal-American, September 14, 1941

"After this, Mr. Lindbergh's virulently unconcealed appeal to anti-Semitism five days later could not be regarded as an isolated episode; . . ."

Herald Tribune, September 17, 1941

"There was no denying that, before Lindbergh spoke, anti-Semitism was one of the weeds that had already sprung up in America First's lush garden. But until Lindbergh publicly described the Jews as a danger to the U. S., anti-Semitism had not burst into full flower."

Time, October 6, 1941

That the wide latitude of characterization and comment currently availed of by the press is not a fresh development but is in the tradition of American journalism appears from any conventional historical survey. See Mott, AMERICAN JOURNALISM.

The District Court referred to the Know-Nothing movement, which in the elections of 1855 carried most of New

England, New York, Kentucky and California and gained some success in other States (R. 22). Of the literature of Know-Nothingism, R. A. Billington says in the PROTESTANT CRUSADE (pp. 7, 346):

"The literature of Know-Knothingism was vehement, bitter, vindictive, intolerant and untruthful. It appealed to the basest instincts and religious prejudices. Not only Irish and Catholics, but Germans, Italians, Hungarians, Swedes, Jews, and foreign-born citizens of every race and creed were the objects of its malicious attacks. The foreign-born employes in the Federal, State and municipal governments were classified and denounced. The most exaggerated and false statements were put out to the public with reference to the purposes and acts of the Catholic church, through its bishops and priests. . . .

"By 1838 an observer complained that books on the subject (anti-Catholicism) had become so numerous that it was impossible to read them all, and bookstores were established in the larger cities to deal solely in anti-Catholic works." . . .

The cross-fire of comment and attack on even the greatest figures in American history was not less vehement and embittered than the criticisms of public figures which fill our press today.

Of George Washington the *Aurora* said on December 23, 1796 (see Mott, *op. cit.*, p. 128):

"If ever a nation was debauched by a man, the American nation has been debauched by Washington. If ever a nation has suffered from the improper influence of a man, the American nation has suffered from the influence of Washington. If ever a nation was deceived by a man, the American nation has been deceived by Washington. Let his conduct then be an example to future ages. Let this serve to be a warning that no man may be an idol . . ."

Appendix

Of Thomas Jefferson the *New England Palladium* said (quoted in the *Hudson Bee*, September 7, 1802, see Mott, *op. cit.*, p. 169):

"Should the Infidel Jefferson be elected to the Presidency, the seal of death is that moment set on our holy religion, our churches will be prostrated, and some infamous prostitute, under the title of the Goddess of Reason, will preside in the Sanctuaries now devoted to the Most High."

Of Abraham Lincoln the *New York Herald* said:

"It is becoming too evident that, so far as a vicious, imbecile, demoralized Administration possesses power, the hideous horrors of civil war are about to be forced upon the country. The deliberations of Mr. Lincoln and his advisors have been shrouded in mystery; but the very concealment they have affected has betrayed their iniquitous purpose. . . .

". . . The masses of the population reprobate the blood-thirsty imbecility of the Washington government. They are forewarned, by the gigantic footsteps with which anarchy has been progressing, but a military despotism is imminent . . . the time cannot be distant when the shameful manner in which Mr. Lincoln and his cabinet are sacrificing the welfare of the land, and betraying its most sacred interests, will call forth an outbreak of indignation before which even Republican fanaticism and intolerance will tremble."

April 9, 1861, quoted in Nevins, AMERICAN PRESS OPINION, pp. 251-2

And again, during the campaign of 1864:

"No influence except compulsion can induce any respectable proportion of the people to cast their votes for that compound of cunning, heartlessness, and folly that they now execrate in the person of their Chief Magistrate."

March 19, 1861, quoted in Mott, *op. cit.*, p. 353

But instances need hardly be multiplied for anyone familiar with published criticisms of public matters during his own lifetime. Comment on public officials going far beyond the imputation of unpopular belief has been and is a commonplace practice of the American press. Any attempt to curb this traditional freedom, to force the press to keep to the bounds of a nice propriety, can succeed only at the expense of destroying the press as a useful instrument in a democracy.

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 745.

THE SCHENECTADY UNION PUBLISHING COMPANY, *Petitioner*,

v.

MARTIN L. SWEENEY.

On Petition For a Writ of Certiorari To The United States Circuit Court of Appeals For The Second Circuit.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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IN THE

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OCTOBER TERM, 1941.

No. 745.

THE SCHENECTADY UNION PUBLISHING COMPANY, *Petitioner*,

v.

MARTIN L. SWEENEY.

On Petition For a Writ of Certiorari To The United States Circuit Court of Appeals For The Second Circuit.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

Opinions Below.

The ruling of the District Court does not appear in the official reports, but is set out at R. 18-28. The decision of the Circuit Court of Appeals is reported in 122 F. 2d 288 (R. 33-39). The Memorandum by the Circuit Court of Appeals denying a petition for rehearing will be found at R. 58.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on July 18, 1941 (R. 33) and a petition for rehearing

was denied on August 15, 1941 (R. 58). The petition for a writ of certiorari was filed November 15, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented.

1. Whether it was error for the Circuit Court of Appeals to hold the publication to be libelous per se under the applicable New York Authorities.
2. Whether the article was, under the New York authorities, fair comment and criticism to the extent that respondent was not entitled to a trial on the merits.
3. Whether the constitutional right of a free press was in any wise impaired by the Circuit Court of Appeals decision.

Statement.

On December 13, 1939, the respondent, a duly elected member of the Congress of the United States from the State of Ohio, filed his complaint for damages for libel against the petitioner, growing out of the publication on December 23, 1938, of an article under the caption "*Washington Daily Merry-Go-Round*" (R. 2-5). By his bill of particulars respondent set forth the entire article published by petitioner and specified the parts thereof which were false and defamatory (R. 13-16). Where persons other than respondent were named in the article, the allegation of falsity was restricted to the respondent (R. 16).

Respondent pleaded general damages alleging that by reason of the libelous publication and its wide circulation, he had been greatly injured in his good name, fame and reputation, in the conduct and execution of his official duties as a duly elected representative in Congress, and in pursuance of his profession as a practicing attorney, in his standing in the community wherein he resides, and in the

high regard, respect, confidence and esteem he had thereto enjoyed among his associates both in the Congress and in the legal fraternity and elsewhere (R. 4-5).

The petitioner's answer contained a general denial, defenses of truth and fair comment and pleas in mitigation of damages (R. 5-9). Thereafter, petitioner filed a motion for judgment on the pleadings (R. 17).

In granting the motion, the District Judge, proceeding on the theory that the article was not actionable per se, clearly erred at the outset by misinterpreting the plain import of the words ascribed to the respondent, viz: "Basis of the Sweeney-Coughlin opposition is the fact that Freed is a Jew, and one not born in the United States" (R. 4). The lower court held that the statement charged Congressman Sweeney with opposing the appointment of Mr. Freed to a federal judicial office merely because the latter was "a foreign born Jew" (R. 20). That this construction was plainly erroneous may readily be seen simply by substituting the noun for the pronoun in the second clause, "• • • and a *Jew* not born in the United States." Hence, the true import is revealed, the respondent was alleged to be opposed to Freed because he was a Jew and a *Jew* not born in the United States.

The District Court, while denouncing bigotry,—

> "That there are such prejudices is greatly to be deplored. That there should be the fullest tolerance can not be questioned." (R. 28),

at the same time proceeding to extend judicial sanction to such attacks when falsely made on a public official, and granted petitioner's motion on the grounds that the article did not hold respondent up to public scorn, contempt and ridicule (R. 28).

Judge Clark, dissenting from the majority, (R. 37), seems to be constrained to the view that a "special rule" exists in New York which extends judicial license to the libeler in practically all matters affecting public officials. That such a view is totally erroneous, when applied to the facts in the

instant case, may readily be seen by even a cursory examination of the decisions in *Tanger* v. *Crowley Pub. Corp.*, 240 App. Div. 203; *Gardner* v. *Home Life Pub., Inc.*, 237 App. Div. 200; and in *Hills* v. *Press Co.*, 122 Misc. 212, aff'd. 214 App. Div. 752, which are cited as authority in the dissent (R. 37). In all three of these decisions, the rule of fair comment and criticism was invoked since the alleged libels were clearly within the privileged class. The articles were genuine criticism based upon *official acts uncontrovertibly true*, whereas, in the instant case, respondent by his bill of particulars, pleaded the *falsity* of the disgraceful *acts* charged to him (R. 16).

Furthermore, in erroneously misconstruing the article to be comment and criticism rather than false statements of the official *acts*, the dissenting Judge opines the rationale of the decision to be dangerous, in holding that comment leading an appreciable number of the public to hate and hold in contempt is, libelous per se (R. 38). The fallaciousness of this is increasingly clear when it is noted that the decision of the majority did not turn on the question whether the publication was comment and criticism, rather were the words at once recognized as *false statements of fact* manifestly not within the rule of fair comment and honest criticism, and in holding the publication to be libelous per se the Court of Appeals correctly applied the doctrine enunciated in *Peck* v. *Tribune Co.*, 214 U. S. 195.*

In addition, the dissenting opinion erroneously relies on the "persuasive reasoning of decisions in other jurisdic-

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* Justice Holmes, speaking for the Court in the *Peck* case, said:

> "Liability is not a question of a majority vote, * * * obviously an unprivileged falsehood need not entail universal hatred to constitute a cause of action. No falsehood is thought about, or even known to all the world. No conduct is hated by all. That it will be known by a large number, and will lead an appreciable fraction of that number to regard the plaintiff with contempt, is enough to do her practical harm * * *." *Peck* v. *Tribune Co., supra.*

tions to sustain the minority view, (R. 38), apparently ignoring the doctrine laid down by this Court in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64.

The Circuit Court of Appeals, by a majority opinion, reversed the decision of the District Court and remanded the cause for trial (R. 37). Reviewing so much of the background of the case as was pertinent to a decision and noting particularly that litigation, involving substantially the same article had been commenced in other jurisdictions with results both favorable and unfavorable to the respondent, the Circuit Court stated that decisions in other jurisdictions were not only conflicting, but were inconclusive for a decision in that Court, since the case must turn on the application of the libel law of the State of New York, citing *Erie Railroad* v. *Tompkins,* 304 U. S. 64. (R. 34-35).

Judge Chase, speaking for the majority, and with Holmes-like clarity and brevity, cited several well established principles enunciated so often by the New York Court of Appeals as to be axiomatic. He reviewed the definition for libel found in two of the leading cases on the subject in New York, viz: *Kimmerle* v. *N. Y. Evening Journal, Inc.,* 262 N. Y. 99, and *Sydney* v. *MacFadden Newspaper Pub. Corp.,* 242 N. Y. 208, and also cited the fact that the definition found in both cases was in general accord with that found in the *Restatement of the Law of Torts, Sec. 559.* (R. 35).

The Court concluded that "the test is whether right-thinking persons would be reasonably expected to be induced by the publication to believe that it truthfully represented the plaintiff's attitude on the subject of Freed's appointment and would be likely to regard him as a consequence in such a way that his reputation was injured" in one or more of the respects set forth in the definition cited in the *Kimmerle* and *Sydney* cases defining civil libel as it has been consistently defined by the New York Court of Appeals. (R. 35-36). See cases *infra,* pp. 9-10.

The majority decision also recognized the well established principle that a false statement to be libelous per se

need not charge a violation of law, and the accusations of disgraceful *acts falsely* made of a public official which would lead right-thinking people to believe him unworthy of public trust and confidence are actionable per se, citing *Bennet* v. *Commercial Advertising Assoc.*, 230 N. Y. 125. (R. 36).*

Acknowledging, of course, the charges imputed to respondent would hold him to the acclaim of those individuals and groups devoted to the cause of religious and racial bigotry, Judge Chase held that the false publication need not entail universal hatred, that it is enough if a noticeable part of the reading public hold the accused up to hatred, scorn or contempt, citing *Peck* v. *Tribune Co.*, 214 U. S. 195; *Restatement, Torts, Sec. 559 (e)*, (R. 36).

Clearing away all doubt as to the meaning of the words ascribed to the respondent, Judge Chase said: "The context does not fairly permit reading the language as meaning the foreign birth of Freed the all sufficient cause of the plaintiff's opposition to his appointment, but rather the contrary by stressing the fact that he was a Jew whose foreign birth apparently but gave an additional basis for plaintiff's opposition." (R. 35).

In addition, Judge Chase also took into consideration the time and place of the publication, and the *current effect* of the publication: See *Levy* v. *Gelber*, 175 Misc. 746 (1941).

> "And certainly the time and place of publication must be given due weight and effect. This plaintiff by being accused of trying to deprive a man of an appoint-

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* Petitioner's brief, (page 6n), apparently considers that Judge Chase made a fatal error in citing as authority the *Bennet* case for the statement: "when made of a public official, false accusations which may lead right-thinking people to believe him unworthy of public trust and confidence are libelous per se," whereas, the *Bennet* decision actually read, "unworthy of public trust and a betrayer of civic confidence." In the first place, Judge Chase did not purport to quote from the decision in the *Bennet* case, and in the second place, it would be "hair splitting" indeed, to contend that the proposition as stated by Judge Chase and as stated in the *Bennet* opinion is not synonymous.

ment to public office because, presumably both in race and religion, he was Jewish would, intolerance being what it is, no doubt gain approval and increase i respect in some quarters; and in others, where only the hit bird flutters, there would be indifference; but in a country still dedicated to religious and racial freedom decent, liberty-loving people still are present in great numbers and still are greatly offended by the narrow-minded injustice of the bigots who see individuals only en masse and condemn them merely because their ancestors were of a certain race or they themselves are of a certain religion. Those who hate intolerance are prone to regard the person who believes in and practices acts of intolerance with aversion and contempt. And in these times when it is universal knowledge that one foreign dictator gained his power by practices which included large-scale, unreasonable Jewish persecutions which have played an important part in making his name an anathema in many parts of this country the publication of such statements such as those alleged may well gain for the person falsely accused the scorn and contempt of the right-thinking in appreciable numbers. Freedom of speech is, as it always has been, freedom to tell the truth and comment fairly upon facts and not a license to spread damaging falsehoods in the guise of news gathering and its dissemination.

"Moreover, in places where Jews make up a sizeable portion of the population, as they are known to do in part of the territory in which it is alleged that the defendant's newspaper circulated when the publication was made, it may be taken for granted that there will be an appreciable number who will hate or hold in contempt one who discriminates against a Jew merely because he is a Jew whether born in this country or not. A majority of the court is of the opinion that the complaint is sufficient under the principles above stated and that the defendant should be required to meet it on the merits.

"Order reversed and cause remanded for trial."

Incorporated in the transcript of the record, as "Appendix A" (R. 13-15), petitioner purports to set forth the "status of Merry-Go-Round Suits."

Obviously, this gratuitous resumé of litigation in jurisdictions other than New York, and accordingly not governed by the law of libel as it exists in New York, is in no way pertinent to a decision on this petition. *Erie Railroad* v. *Tompkins,* 304 U. S. 64.

Nevertheless, the respondent finds it incumbent to point out at least a few of the statements which are not only misleading, but some of which are absolute misstatements of fact.

Petitioner sets forth "one case pending" in the State of Washington (R. 53). The respondent has no case pending and has never instituted suit for damages in the State of Washington arising out of this publication or for any other matter.

The several cases cited as "dismissed" by Judge Hopkins of the Kansas District Court, were dismissed *without prejudice,* due to the inability of Mr. Sweeney to be personally present for the trial. The quality of the libelous words was not in issue as the Court had previously denied motions by the defendants to dismiss for failure to state a cause of action, and defendants' motions for judgment on the pleadings.

In Ohio, cases filed by Congressman Sweeney were dismissed, following the Court's decision in Akron Beacon Journal suit, wherein it was held the publication was not libelous per se because it did not charge a violation of the moral or criminal code. (Obviously not the law in New York, see cases *infra* p. 11).

The suit against the Greenwood Index-Journal (South Carolina) was dismissed because of a technical error in naming the defendant, in the complaint. The merits of the controversy was in no way in issue.

In Tennessee the action against the Chattanooga Free Press was discontinued on motion by the plaintiff, pursuant to agreement between the parties.

The suit against the Newport News Daily Press (Virginia) was dismissed by agreement of the parties and the action against the Suffolk News-Herald (Virginia) was

dismissed for lack of prosecution due to the inability of Congressman Sweeney to be present on the trial date. In neither case were the merits of the libel in issue. In the last named suit in Virginia—Martinsville Daily Bulletin—cited as "dismissed," the article was entirely incoherent, due to a mistake of the typesetter in jumbling the type. Hence, the article being unintelligible, it could not be libelous.

Argument.

The Publication is Libelous Per Se.

The determinative issue herein is whether the Court of Appeals erred in holding the publication to be libelous per se, under the applicable New York Authorities. The article being published in New York, the law of that State is controlling. *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64.

And, in ascertaining the libeler's liability the *same principles* apply to a libel of a public officer or a candidate for office, as to libels of private individuals, unless the statements fall within the strictly confined limits of fair and honest criticism. *Cartright* v. *Anderson,* 208 App. Div. 1.

An article is libelous per se when it tends to expose the person to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or tends to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society, *in any one or more of these respects. Dall* v. *Time, Inc.,* 252 App. Div. 637, aff'd. 278 N. Y. 635; *Kimmerle* v. *New York Evening Journal, Inc.,* 262 N. Y. 99; *Sydney* v. *MacFadden Newspaper Pub. Corp.,* 242 N. Y. 208; *Bennet* v. *Commercial Advertiser Assn.,* 230 N. Y. 125; *Triggs* v. *Sun Printing & Pub. Assn.,* 179 N. Y. 144; *Morey* v. *Morning Journal Assn.,* 123 N. Y. 207; *Morrison* v. *Smith,* 177 N. Y. 366; *Gates* v. *New York Recorder Co.,* 155 N. Y. 288; *Mattice* v. *Wilcox,* 147 N. Y. 624; *Moore* v. *Francis,* 121 N. Y. 199; *Bergman* v. *Jones,* 94 N. Y. 51; *MacFadden* v. *Morning Journal Assn.,*

28 App. Div. 508; *Shelby* v. *Sun Printing & Pub. Assn.*, 38 Hun. 474, aff'd. 109 N. Y. 611; *Cooper* v. *Greeley*, 1 Denio. 347; *Root* v. *King*, 7 Cow. 613; *Van Ness* v. *Hamilton*, 19 Johns. 349; *Steele* v. *Southwick*, 9 Johns. 214; *Riggs* v. *Denniston*, 3 Johns Cases 198.

The words expose him to hatred, contempt, ridicule, etc., are merely expressive as to the manner in which the reputation is injured, but, the question, is, whether the publication tends to lower him in the opinion of men whose standard of opinion the Court can properly recognize—*the essential is that reputation is injured. Cohen* v. *New York Times Co.*, 153 App. Div. 242.

Well in point is the case of *Sumner* v. *Liberty Pub. Corp.*, 240 App. Div. 118, (decided 1934). Sumner, a Deputy Commissioner of Internal Revenue, was charged with firing experienced employees and hiring new ones, who, it was charged, could not obtain work without "political drag." In holding the article to be libelous per se the Court ruled that the accusation that Sumner "accepted public office and proceeded to eliminate competent employees and to substitute political incompetents either at his own volition or at the dictation of others, charges the grossest kind of misfeasance and betrayal of his public trust."

Petitioner urges that the recent policy of the State has been to limit and restrict the causes for actions in libel. That such an assumption is utterly without merit is evidenced by the decision of the New York Court of Appeals in *Katapodis, et al.*, v. *Brooklyn Spectator, Inc.*, (decided November 27, 1941),——N. Y.——.

In the *Katapodis* case, defendant merely published false words tending to impute poverty to the plaintiffs and as such, the words could excite not ridicule, but sympathy. However, the Court, quoting from *Moffatt* v. *Cauldwell*, 3 Hu. (N. Y.) 26, (decided many years ago), stated:

> "But the proposition that ridicule is a *non sequitur* from such an imputation, is not universally true."

And, in affirming the Appellate Division, that the issue should be met on the merits the Court said:

> "The reason is that in libel the matter is defamatory not only if it brings a party into hatred, ridicule or contempt by asserting moral discredit upon his part, but also if it tends to make him shunned or avoided, although it imputes no moral turpitude to him." Citing *Youssoupoff* v. *Metro-Goldwyn-Mayer Pictures*, 50 T. L. R. 581; *Shelby* v. *Sun Printing & Pub. Assn.*, 109 N. Y. 611; *Kimmerle* v. *New York Evening Journal, Inc.*, 262 N. Y. 99.

In determining whether a given publication has injured the person's reputation, the *current* effect of the statements is the decisive test. *Levy* v. *Gelber*, 175 Misc. 746, (decided 1941).

Applying these long established rules of the law of libel laid down by the Courts of New York, we have but to examine the publication to be immediately impressed by the correctness of the Circuit Court of Appeals decision.

The salient *facts* of the article are as follows:

Respondent is accused of being a part of "a hot behind-the-scenes fight" in Congress "to prevent the appointment of a Jewish judge;" the proposed appointee was Emerich Burt Freed who was "on the verge of being elevated to the U. S. District Court;" Congressman Sweeney's "violent opposition" had been aroused, and the "basis" of his opposition was the *fact* that "Freed is a Jew, and one not born in the United States;" that Freed had been brought to this country at an early age and had been for a number of years a naturalized citizen; the article, after reciting these *statements of fact*, concludes with the further *statement of fact* that, "Irate Representative Sweeney is endeavoring to call a caucus of Ohio Representatives December 28 to protest against Freed's appointment." (R. 4).

As is readily seen the alleged reasons advanced for respondent's opposition were not that the candidate was unqualified for the office, but squarely on the point that he was a ***Jew and a Jew not born in this country.***

The inescapable import of the words is that respondent opposed the appointment of a man because he was a Jew. Whether the word "Jew" was intended by the authors to mean the race or the religion is unimportant. The term is unqualified and in ordinary common parlance is accepted to mean either race or religion, or, as the Jewish race and the Jewish religion are practically co-terminus, both. The natural and normal inference to be drawn from the fact that a man is opposed to the appointment of a person to office because that person is a Jew, is that such man is prejudiced against Jews, is bigoted, or dislikes Jews because they are Jews. It is to be noted that the opposition of Mr. Sweeney is said to be "violent" indicating that his prejudice, bigotry and dislike are proportionately severe.

In the decade 1930-1940, religion and racial hatred has set the world in flame, rivaling if not surpassing, the days of the martyrs and the Dark Ages. America has stood out to the world as one of the last bulwarks against intolerance and totalitarianism. Whatever mark Adolf Hitler may leave on the pages of history, no doubt he shall be longest remembered for his persecution of the Jews. It was his treatment of the Jews that caused him to be universally despised by the people of these United States. All of these events have led this country and its citizens to take measures to insure the continuance of the tolerance, which we have so long enjoyed. Those, like Father Coughlin, who have been accused of fostering religious and class hatred have been held in disgrace and contempt.

This recitation of existing conditions is not mere fanciful thinking. All are facts, and facts which the Circuit Court of Appeals properly considered (See *Sydney* v. *McFadden Newspaper Corp.*, 242 N. Y. 208, and cases therein cited), in correctly construing the publication to be libelous per se (R. 36-37).

It was at such a time as this that plaintiff was accused of being guilty of religious and racial intolerance.

Applying the test laid down by the Court of Appeals of New York State in the cases cited, *supra*, p. 9, what ef-

fect did this accusation have in the minds of ordinary, reasonable and right-thinking citizens? Certainly, it must have engendered the hatred and contempt of our Jewish citizens.

The Court must take judicial notice of the fact that Jews comprise an important and respectable part of most every community; that at least an important and respectable part of every community, other than Jews, consider it un-American to discriminate against a citizen of the United States because of his religion or his race; that Article 6, Section 3, *Constitution of the United States* provides:

> "No religious Test shall ever be required as a qualification to any Office or public Trust under the United States";*

and that Congressman Sweeney by his oath of office** is sworn to support and uphold the Constitution.

Undoubtedly it caused that vast majority of our citizens who are dedicated to the cause of tolerance of race and creed, to look upon Mr. Sweeney with contempt and shame. Such an accusation placed respondent in disgrace and deprived him of the confidence and friendly intercourse of his constituents. Such was the natural and normal tendency of this publication. This would follow even if Mr. Sweeney were but a private citizen. When spoken of him as a Congressman, as the article expressly does, the shame, hatred, degradation and disgrace is heightened and enhanced. There might be some excuse for respondent, as a private citizen, to oppose the appointment of a Jew, but Mr.

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*—With respect to "no religious test" for office, Justice Story, in his *Commentaries on the Constitution (5th Ed.), Sec. 1847*, says:

> "'The framers of the Constitution * * * knew that bigotry was unceasingly vigilant in its stratagems to secure to itself an exclusive ascendency over the human mind, and that intolerance was ever ready to arm itself with all the terrors of the civil power to exterminate those who doubted its dogmas or resisted its infallibility."

**—*House Rules and Manual, 77 Congress, Page 71, Sec. 229.*

Sweeney, as a representative of the people in Congress, sworn to represent all equally and fairly, can claim none.

There can be no question but that the Court of Appeals correctly held the article to be actionable per se and properly remanded the cause for trial on the merits.

Defense of Fair Comment and Honest Criticism, Presents a Jury Question.

The "special rule" which petitioner seeks to have applied in the instant case, is nothing more than the rule relating to fair comment and criticism.*

Under the New York authorities this privilege to comment upon matters of public concern is strictly limited to criticism, and is not applicable to *misstatements of fact. Briarcliff Lodge Hotel Inc.* v. *Citizen Sentinel Pub. Inc.*, 250 N. Y. 106; *Foley* v. *Press Pub. Co.*, 226 App. Div. 535; *Cohalan* v. *New York World-Telegram Corp.*, 172 Misc. 1061; *Sherman* v. *International Publications*, 214 App. Div. 437; *Hoey* v. *N. Y. Times Co.*, 138 App. Div. 149, Annotations, A. L. R. 412. In other words "the assertion of a *fact* is not a *comment* at all." *Bingham* v. *Gaynor*, 141 App. Div. 301, aff'd. 203 N. Y. 27.

The *known or admitted acts* of a public official are open to fair and honest criticism which is protected under qualified privilege. But the privilege is qualified:—

> "* * * because it does not extend beyond fair and honest comment and criticism. It is no protection to the writer if he therein makes *false statements* or unjustifiable inferences. In making such a communication the writer makes *statements of fact* at his peril, and, if the statements made therein are libelous and untrue, the fact that they are made about a public officer does not exempt the writer on the ground of privilege." *Bingham* v. *Gaynor*, 203 N. Y. 27. (Italics supplied).

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* The opinions of Judge Taft in *Post Publishing Co.* v. *Hallam*, 59 F. 539, and of Justice Holmes in *Burt* v. *Advertiser Newspaper Co.*, 154 Mass. 238, set forth with great clarity the overwhelming weight of authority both in this country and in England, the rule relating to privilege in matters of public concern. See also—23 *Harvard Law Review* 413.

To the same effect:

De Hoyos v. *Thornton*, 259 App. Div. 1;
Cartright v. *Anderson*, 208 App. Div. 1;
Lunn v. *Littaner*, 187 App. Div. 808;
Hoey v. *New York Times*, 138 App. Div. 149;
Hamilton v. *Eno*, 81 N. Y. 116;
Powers v. *Dubois*, 17 Wend. (N. Y.) 63;
Littlejohn v. *Greeley*, 13 Abb. Proc. (N. Y.) 41.

The following cases cited by petitioner as sustaining its point of view are obviously in no wise analagous to the facts herein.

In the case of *Tanzer* v. *Crowley Publishing Corporation*, 240 App. Div. 203, the article was clearly fair comment and criticism, based upon asserted facts. The Court in that case also remarked that "other alleged charges against plaintiff shown in the article are so indefinite and illusory as to fall short of compliance with the rule that provides that in order to constitute a libel, the charge must be clear and specific."

In the case of *Hill* v. *Press Company*, 122 Misc. 212, again the alleged libel was within the privileged class and was based on *facts truly stated.*

In the case of *Gardner* v. *Home Life Publishers*, 237 App. Div. 200, the alleged libel was also clearly within the privileged rule of fair comment and criticism and contained nothing of a vicious or disgraceful matter. In that case the statement alleged to be libelous read as follows: "Although City Comptroller Gardner (New Rochelle) announced to a Syracuse convention that New Rochelle would have no deficit in 1931, two days later the city was forced to obtain a rush loan on advanced tax certificates (at six per cent) to pay municipal salaries."

The article in each of these cases was genuine criticism based upon facts indisputably true and afford no precedent for the case at bar.

The utter fallacy of petitioner's contention lies in its marked failure to make any distinction whatsoever between comment and criticism based upon *facts truly stated,* and comment and criticism based upon *fictitious* statements of fact. (cases *supra,* p. 14.)

The accusations directed at respondent are manifestly *statements of fact* which clearly charge the commission of *acts* constitutiong not only misfeasance in office, but a betrayal of an electorate, which had placed him in office to represent them, fairly and honestly and without regard to race, creed or color.

In any event, whether or not the allegations in the publication, are allegations of fact or expressions of opinion, and, if expressions of opinion, (which we contend they are definitely not), whether such expressions are fairly warranted by the facts truly stated, are questions for the jury to decide under proper instructions from the trial judge. *Foley* v. *Press Pub. Co.,* 226 App. Div. 535 (involving an officer of the United States Navy). And in *Cohalen* v. *New York World-Telegram Corp.,* 172 Misc. 1061 (involving an official referee of the New York Supreme Court), the Court said:

> "The question of whether an editorial writer has exceeded fair criticism, is by the weight of modern appellate authorities, properly submitted to the jury, even where there may be a doubt." Citing *Kenna* v. *Daily Mirror, Inc.,* 250 App. Div. 625, aff'd. 276 N. Y. 483; *Triggs* v. *Sun Printing & Publishing Assn.,* 179 N. Y. 144, 154; *McInerney* v. *New York World Telegram Corp.,* 166 Misc. 266.

Here the charges directed at Congressman Sweeney are stated as *facts,* not as opinions of the publisher, and even if they were to be construed as opinions or criticism of Mr. Sweeney by the petitioner, there are no *facts* stated or referred to on which such opinion or criticism could be predicted, and, in any event, if there be such facts, it is for the jury to decide whether or not they are *truly stated.*

No Constitutional Question Involved.

Relying on statements found in a confusion of cases where the facts are in no way analogous to facts herein, petitioner vaguely contends that the decision of the Circuit Court of Appeals amounts to a restriction on the constitutional guarantees of a free press. Not one of the cited cases, purported to be in support of this proposition, involved a *civil suit for libel.* For the most part, the decisions petitioner relies on, concerned only the power of the several states in enacting statutes regulating picketing in labor disputes, and in one case (*Near* v. *Minnesota,* 283 U. S. 697) the action involved the constitutionality of a penal statute suppressing the publication of entire newspapers on the ground that they were a public nuisance. This Court rightly held the statute to be "the essence of censorship." However, it was also held by this Court in this same case that the common-law rules which subject a libeler to responsibility for the public offense, as well as the *private injury,* are not abolished by the constitutional protection of liberty of speech and of the press. *Near* v. *Minnesota, supra.* See also—*People* v. *Gitlow,* 234 N. Y. 132, aff'd. *Gitlow* v. *New York,* 268 U. S. 652.

Justice Story, in reference to the constitutional right of free speech and of the press, said:

> "That this amendment was intended to secure to every citizen an absolute right to speak, or write, or print whatever he might please, without any responsibility, public or private, therefor, is a supposition too wild to be indulged by any rational man. * * * Civil society could not go on under such circumstances. Men would then be obliged to resort to private vengeance to make up for the deficiencies of the law; and assassinations and savage cruelties would be perpetrated with all the frequency belonging to barbarous and brutal communities. It is plain, then, that the language of this amendment imports no more than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever without any prior restraint, so always that he does not injure any

> other person in his rights, person, property, or reputation; and so always that he does not thereby disturb the public peace, or attempt to subvert the government. It is neither more nor less than an expansion of the great doctrine recently brought into operation in the law of libel, that every man shall be at liberty to publish what is true, with good motives for justifiable ends. And with this reasonable limitation it is not only right in itself, but it is an inestimable privilege in a free government. Without such a limitation, it might become the scourge of the republic, first denouncing the principles of liberty, and then, by rendering the most virtuous patriots odious through the terrors of the press, introducing depotism in its worst form." *Story's Commentaries on the Constitution, (5th Ed.), Sec. 1880.*

Freedom of the press has never been construed to authorize or sanction unbridled license to assassinate reputation, whether the reputation be that of a public official or a private citizen. The newspapers of the present day are not unduly guarded or restricted in making charges against public officials so long as they are *honestly* and *fairly* made. See *Post Pub. Co.* v. *Hallam* (C. C. A. 6th), 59 F. 539.*

We are fully in accord with petitioner's statement that "The decision is understandable as the instinctive reaction of men who hate religious bigotry with all their heart," and we respectfully submit that the accusations directed, in the publication, to Congressman Sweeney, are such as would make the normal decent and liberty-loving American citizen, hold him up to ridicule, contempt and shame and cause him to be shunned and avoided.

Petitioner contends that the public official, or the private citizen, has no legal recourse for libelous attacks attributing anti-racial and anti-religious *acts*, for the asserted reason that should the same public official, or the private in-

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* In the case of *Sweeney* v. *Joliet Printing Co.*, Civil No. 1204, in D. C. Northern Div. of Ill. (unreported), involving substantially the same article as here in issue, the Court said:

> "Freedom of the press does not mean irresponsibility for newspaper publishers. And that freedom will best be preserved through the exercise of care by the publishers in verifying slanderous statements before publishing them."

dividual, make similar attacks on Jews, Protestants, Catholics, etc., as entireties, the individuals of such groups would have no legal recourse. That such a proposition is obviously untenable is plainly indicated by the decision in *Levy* v. *Gelber*, 175 Misc. 746 (decided 1941). The individual's right to a good reputation, when he has done nothing to cause it to be otherwise, is a paramount one, ever to be protected, if true democracy is to survive. To hold otherwise would truly create "new law."

It is no answer that the minorities, ever championed in this bulwark of democracy, must snatch the "seige gun in the hands of bigots" and turn it, not on the libelers, but direct its lethal sting at the falsely accused individual. Weapons of this kind and character are dangerous instrumentalities not only in the hands of majorities or minorities, but, also in the hands of the libeler, who at a stroke, may wreck the good reputation of decent men.

Our judicial system provides ample safeguards for he who will fairly comment and honestly criticize and it even protects the publisher of libelous statements, if the *truth* is shown. Where the publication is so apparently libelous, as in the instant case, *truth* is not the unwary and illusive creature, but rather the vindicator, always present to uphold or denounce.

It is quite evident from the foregoing that the petitioner has no standing before this Court on the asserted ground that the constitutional guarantees of a free press has in any wise been impaired.

Conclusion.

The decision of the Circuit Court of Appeals is correct and not in conflict with any other applicable decisions, or in conflict with any of the provisions of the Constitution of the United States. Accordingly, the petition should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 745.

THE SCHENECTADY UNION PUBLISHING COMPANY, *Petitioner*,

v.

MARTIN L. SWEENEY.

BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

The ruling of the District Court does not appear in the official reports, but is set out at R. 14-22. The decision of the Circuit Court of Appeals is reported in 122 F. 2d 288 (R. 27-33). The memorandum by the Circuit Court of Appeals denying a petition for rehearing will be found at R. 35.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on July 18, 1941 (R. 27), and a petition for rehearing was denied on August 15, 1941 (R. 58). The petition for a writ of certiorari was filed November 15, 1941, under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 [28 U. S. C., Sec. 347(a).] Certiorari was granted on December 22, 1941, Mr. Justice Jackson not participating (R. 37).

STATEMENT.

Complaint.

On December 14, 1939, the respondent, a duly elected member of the Congress of the United States from the State of Ohio, filed his complaint for damages for libel against the petitioner, growing out of the publication on December 23, 1938, of an article under the caption "Washington Daily Merry-Go-Round" (R. 2-4), written by Drew Pearson and Robert S. Allen (R. 7).

Respondent pleaded general damages alleging that by reason of the libelous publication and its wide circulation, he had been greatly injured in his good name, fame and reputation, in the conduct and execution of his official duties as a duly elected representative in Congress, and in pursuance of his profession as a practicing attorney, in his standing in the community wherein he resides, and in the high regard, respect, confidence and esteem he had thereto enjoyed among his associates both in the Congress and in the legal fraternity and elsewhere (R. 3-4). By his bill of particulars respondent set forth the entire article published by petitioner and specified the parts thereof which were false and defamatory (R. 10-13). Where other individuals were named in the article, the allegation of falsity was restricted to the respondent (R. 13).

Answer.

The petitioner's answer contained a general denial, defenses of truth and fair comment and pleas of mitigation of damages, but raised no question as to the possibility of any infringement of the constitutional rights of freedom of the press and of speech (R. 4-7).

Thereafter, petitioner filed a motion for judgment on the pleadings, contending that the complaint did not state facts sufficient to constitute a cause of action (R. 13).

Opinion of District Court.

The District Judge at the outset proceeded to interpret the meaning of the words: "Basis of the Sweeney-Coughlin opposition is the fact that Freed is a Jew, and one not born in the United States," as imparting that respondent was allegedly opposing Mr. Freed's appointment to a federal judicial office merely because the latter was "a foreign born Jew" (R. 15). The Court incorrectly ascribed this as being "plaintiff's construction of the publication" (R. 15).

It will be hereinafter shown that, where the meaning of the words are in doubt, it becomes the duty of the jury, not the Court, to determine whether they are subject of a libelous interpretation. However, for the present, it will suffice to point out the obvious error of the lower court in supplying such a construction to the words in question. This may readily be observed by the simple expedient of substituting the noun for the pronoun in the second clause, " • • • and a *Jew* not born in the United States." Hence, the true import is revealed, the respondent was alleged to be opposed to Freed because he was a Jew and for the additional reason that he was a *Jew* not born in the United States. The charge could have but one meaning, Congressman Sweeney was anti-Semitic,—or speaking in the vernacular, a Jew hater,—and practiced it in his official position.

The decision does not purport to make applicable the principle laid down by this Court in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64. It merely recites that respondent asserted (as he does here) the New York law to be controlling and that decisions of other states were inapplicable (R. 15). On the contrary the opinion reveals that the lower court either did not follow the Erie Railroad decision or it erroneously applied the decisional law of New York.

The fallacy of the logic advanced in the opinion may be immediately observed from the court's own acceptance of the bigot's doctrine that "Prejudices relating to nationality and religion are quite common even in this country of constitutional right, liberty and equality" (R. 21). If such

be the criterion, then those things for which "constitutional right, liberty and equality," have always stood, are paralyzed ideals. With logic equal to that of the lower court, we could run through the gamut of crimes that fill our courts each day, and turn loose upon civilized society the culprits guilty of the "quite common" disturbances.

Nor can we condone prejudice and bigotry as the court did (R. 22) by reverting to the middle of the last century and resurrecting the "Know Nothing Party" as a present day example of the sum total of the labors of those who have fought and struggled to achieve the ideals in which our country was cradled.

Though the court felt constrained to denounce bigotry,—

"That there are such prejudices is greatly to be deplored. That there should be the fullest tolerance can not be questioned" (R. 22),

it nevertheless proceeded to extend judicial sanction to such attacks when falsely made on a public official, and granted petitioner's motion on the ground that the article was not such that it would hold respondent up to public scorn, contempt and ridicule! (R. 22)

Decision in Circuit Court of Appeals.

Judge Chase, speaking for the majority of the Circuit Court of Appeals, reviewed so much of the background of the case as was pertinent to a decision and noted particularly that litigation, involving substantially the same article had been commenced in other jurisdictions with results both favorable and unfavorable to the respondent. However, Judge Chase stated that decisions in other jurisdictions were not only conflicting, but were inconclusive for a decision in that Court, since the case must stand or fall on the application of the libel law of the State of New York, citing *Erie Railroad* v. *Tompkins,* 304 U. S. 64 (R. 28-29).

With maximum clarity and understanding of the issue at hand, Judge Chase, in speaking for the majority of the

Court, cited those well established principles enunciated so often by the New York Court of Appeals as to be axiomatic.

He reviewed the definition for libel found in two of the leading cases on the subject in New York, viz: *Kimmerle* v. *N. Y. Evening Journal, Inc.*, 262 N. Y. 99, and *Sydney* v. *MacFadden Newspaper Pub. Corp.*, 242 N. Y. 208, and also cited the fact that the definition found in both cases was in general accord with that found in the *Restatement of the Law of Torts, Sec. 559* (R. 29).

The Court correctly came to the conclusion that "the test is whether right-thinking persons would be reasonably expected to be induced by the publication to believe that it truthfully represented the plaintiff's attitude on the subject of Freed's appointment and would be likely to regard him as a consequence in such a way that his reputation was injured" in one or more of the respects set forth in the definition cited in the *Kimmerle* and *Sydney* cases, defining civil libel as it has been consistently defined by the New York Court of Appeals (R. 29-30). See cases *infra*, pp. 10.

The majority decision also recognized the eminently sound principle that a false statement, to be libelous *per se*, need not charge a violation of law, and that accusations of disgraceful *acts falsely* made of a public official which would lead right-thinking people to believe him unworthy of public trust and confidence are actionable *per se*, citing *Bennet* v. *Commercial Advertising Assoc.*, 230 N. Y. 125 (R. 30).*

Apparently recognizing the scourge of religious and racial hatred that in recent years has swept through some coun-

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* Petitioner (Pet. Br. p. 6n) apparently considers that Judge Chase committed a fatal error in citing as authority the *Bennet* case for the statement: "when made of public official, false accusations which may lead right-thinking people to believe him unworthy of public trust and confidence are libelous per se," whereas, the *Bennet* decision actually read, "unworthy of public trust and a betrayer of civic confidence." In the first place, Judge Chase did not purport to quote from the decision in the *Bennet* case, and in the second place, it would be "hair splitting" indeed, to contend that the proposition as stated by Judge Chase and as stated in the *Bennet* opinion is not synonymous.

tries of Europe, and which, to at least some extent, has imbedded its poisonous claws in the social structure of our own democracy,* Judge Chase, acknowledged that the charges imputed to respondent would entitle him to the acclaim of those individuals and groups devoted to the cause of spreading religious and racial hatred. But, the Court rightfully applied the doctrine enunciated by Mr. Justice Holmes, in *Peck* v. *Tribune Co.*, 214 U. S. 185, that a false publication need not entail universal hatred, that it is enough if a noticeable part of the reading public hold the accused up to hatred, scorn and contempt.

Clearing away all doubt as to the meaning of the charge against the respondent, Judge Chase said:

> "The context does not fairly permit reading the language as meaning the foreign birth of Freed the all sufficient cause of the plaintiff's opposition to his appointment, but rather the contrary by stressing the fact that he was a Jew whose foreign birth apparently but gave an additional basis for plaintiff's opposition." (R. 29.)

In addition, the Court also took into consideration the time and place of the publication, and the *current effect* of the publication (see *Levy* v. *Gelber*, 175 Misc. 746, N. Y., 1941):

> "And certainly the time and place of the publication must be given due weight and effect. This plaintiff by being accused of trying to deprive a man of an appointment to public office because, presumably both in race and religion, he was Jewish would, intolerance being what it is, no doubt gain approval and increased respect in some quarters; and in others, where only the hit bird flutters, there would be indifference; but in a country still dedicated to religious and racial freedom decent, liberty-loving people still are present in great numbers and still are greatly offended by the narrow-minded injustice of the bigots who see individuals only

* For examples we suggest the press clippings contained in petitioner's brief, Appendix, pp. 49-60.

en masse and condemn them merely because their ancestors were of a certain race or they themselves are or a certain religion. Those who hate intolerance are prone to regard the person who believes in and practices acts of intolerance with aversion and contempt. And in these times when it is universal knowledge that one foreign dictator gained his power by practices which included large-scale, unreasonable Jewish persecutions which have played an important part in making his name an anathema in many parts of this country the publication of such statements such as those alleged may well gain for the person falsely accused the scorn and contempt of the right-thinking in appreciable numbers. Freedom of speech is, as it always has been, freedom to tell the truth and comment fairly upon facts and not a license to spread damaging falsehoods in the guise of news gathering and its dissemination.

"Moreover, in places where Jews make up a sizeable portion of the population, as they are known to do in part of the territory in which it is alleged that the defendant's newspaper circulated when the publication was made, it may be taken for granted that there will be an appreciable number who will hate or hold in contempt one who discriminates against a Jew merely because he is a Jew whether born in this country or not. A majority of the court is of the opinion that the complaint is sufficient under the principles above stated and that the defendant should be required to meet it on the merits.

"Order reversed and cause remanded for trial."

Minority View.

Judge Clark, dissenting from the majority opinion, (R. 31) appears to be constrained to the view that New York has adopted a "special rule" in the matter of public officials, and judicial license is extended to the libeler to publish what he pleases, just so long as the libeled official is unable to calculate in dollars and cents the loss to his reputation and so long as the scorn, contempt and ridicule heaped upon him is insufficient for his removal from office. The view stated in the dissent is obviously erroneous, and, particularly so, when applied to the facts in the case at bar.

Even a cursory examination of the New York decisions in *Tanger* v. *Crowley Pub. Corp.*, 240 App. Div. 203; *Gardner* v. *Home Life Pub., Inc.*, 237 App. Div. 200; and in *Hills* v. *Press Co.*, 122 Misc. 212, aff'd 214 App. Div. 752, cited as authority for the dissent, (R. 31) rather conclusively indicates that the facts in those cases were quite unlike the accusations directed at the respondent. In all three of those decisions, the rule of fair comment and criticism was invoked, since the alleged libels were clearly within the purview of the privileged class. The articles were merely *opinions* of the publishers predicated upon *truly stated facts*, hence the opinions deduced from such facts, although false, were excusable as fair comment and criticism. However, since in the instant case, respondent, by his bill of particulars, pleaded the *falsity* of each and all of the *stated facts* attributed to him, (R. 13) it necessarily follows that any deduction or opinion that respondent was opposed to Mr. Freed for *any reason* was not based upon *facts truly stated*.

Moreover, in erroneously misconstruing the article to be "comment" and "criticism" rather than false statements of the official *acts*, the dissenting Judge opines the rationale of the majority to be dangerous, in holding that comment, leading an appreciable number of the public to hate and hold in contempt, is libelous *per se* (R. 38). The fallaciousness of this is increasingly clear when it is noted that the decision of the majority did not turn on the question whether the publication was comment and criticism, rather were the words at once recognized as *false statements of fact* manifestly not within the rule of fair comment and honest criticism, and in holding the publication to be libelous *per se* the Court of Appeals correctly applied the rule stated, for a unanimous Court, by Mr. Justice Holmes, in *Peck* v. *Tribune Co.*, 214 U. S. 185. To hold otherwise would truly create "new law" in the face of the established precedent set in the *Peck* case.

In addition, the dissenting opinion erroneously relies on the "persuasive reasoning" of decisions in other jurisdic-

tions to sustain the minority view (R. 38). It is of course now well settled that such decisions are not only not controlling, but the law of libel being determined by the statutes and precedents of the particular forum, they lack even persuasiveness and understanding, in a jurisdiction having no such statutes and not bound by similar precedents. *Erie Railroad* v. *Tompkins, supra.*

LAW AND ARGUMENT.

Point I.

The Publication is Libelous Per Se Under All Applicable New York Authorities.

Petitioner's brief raises several points, but as it will be hereinafter seen the sole and determinative question, is whether the Circuit Court of Appeals correctly stated the law in holding the words complained of to be actionable *per se.*

The publication having occurred in New York, the law of that State, under the rule announced by this Court in *Erie Railroad Co.* v. *Tomkins, supra,* is controlling.

(*A*) *The Test to Be Applied.*

In the matter of public officials it is generally held that:

> "Words charging misconduct in office, want of official integrity or fidelity to public trust, words inconsistent with the due fulfillment of official duty, words which tend to deprive an official of his office, and words which are likely to produce public contempt and the reprobation of right minded men are libelous *per se. L. R. A. 1918-E. P. 23.* See also, *Newell, Libel & Slander,* (4 Ed.) pp. 44-45, and 36 C. J. Sec. 87, p. 1188.

There is hardly a case on record in which the courts have not explicitly stated that an article is libelous *per se* when it tends to expose the person to public hatred, shame, obliquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or tends to induce an evil opinion of one in the minds of right-thinking persons, and

to deprive one of their confidence and friendly intercourse in society, *in any one or more of these respects. Dall* v. *Time, Inc.*, 252 App. Div. 637 aff'd. 278 N. Y. 635; *Kimmerle* v. *New York Evening Journal, Inc.*, 262 N. Y. 99; *Sydney* v. *MacFadden Newspaper Pub. Corp.*, 242 N. Y. 208; *Bennet* v. *Commercial Advertiser Assn.*, 230 N. Y. 125; *Triggs* v. *Sun Printing & Pub. Assn.*, 179 N. Y. 144; *Morey* v. *Morning Journal Assn.*, 123 N. Y. 207; *Morrison* v. *Smith*, 177 N. Y. 366; *Gates* v. *New York Recorder Co.*, 155 N. Y. 288; *Mattice* v. *Wilcox*, 147 N. Y. 624; *Moore* v. *Francis*, 121 N. Y. 199; *Bergman* v. *Jones*, 94 N. Y. 51; *MacFadden* v. *Morning Journal Assn.*, 28 App. Div. 508; *Shelby* v. *Sun Printing & Pub. Assn.*, 38 Hun. 474, aff'd. 109 N. Y. 611; *Cooper* v. *Greeley, Denio*, (N. Y.) 347; *Root* v. *King*. 7 Cow. (N. Y.) 613; *Van Ness* v. *Hamilton*, 19 Johns (N. Y.) 349; *Steel* v. *Southwick*, 9 Johns. (N. Y.) 214; *Riggs* v. *Denniston*, 3 Johns. (N. Y.) 198.

The words, "expose him to hatred, contempt, ridicule," etc., do not constitute merely a "formulary definition," (Pet. Br. 11), but they are expressive as to the manner in which the reputation is injured. Without the descriptive power of words, the law would be compelled to revert to "picture writing" to enforce compliance with the statutes. In actions for libel, the question is, whether the publication tends to lower the accused in the opinion of men whose standard of opinion the Court can properly recognize—*the essential is that reputation is injured. Cohen* v. *New York Times Co.*, 153 App. Div. 242.

And, in ascertaining the libeler's liability, the *same principles* apply to a libel of a public officer or a candidate for office, as to libels of private individuals, unless the statements fall within the strictly confined limits of fair and honest criticism. *Cartright* v. *Anderson*, 208 App. Div. 1.

Petitioner urges that the recent policy of the State has been to limit and restrict the causes for actions in libel.*

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* As indicative of a broader policy obtaining in New York, petitioner quotes from the opinion in *Garriga* v. *Richfield*, 174 Misc. 315 (Pet. Br. 25), in which the Court held that charging one with being a "Communist" was not libelous *per se*. However, in a later

That such an assumption is utterly without merit is evidenced by the decision of the New York Court of Appeals in *Katapodis, et al,* v. *Brooklyn Spectator, Inc.,* (decided November 27, 1941), 287 N. Y. 17.

In the *Katapodis* case, defendant merely published false words tending to impute poverty to the plaintiffs and as such the words could excite not ridicule, but sympathy. However, the Court quoting from *Moffatt* v. *Cauldwell,* 3 Hun. (N. Y.) 26, stated:

> "But the proposition that ridicule is a *non sequitur* from such an imputation, is not universally true."

And, in affirming the Appellate Division, that the issue should be met on the merits, the Court said:

> "The reason is that in libel the matter is defamatory not only if it brings a party into hatred, ridicule or contempt by asserting moral discredit upon his part, but also if it tends to make him shunned or avoided, although it imputes no moral turpitude to him." Citing, "*Youssoupoff* v. *Metro-Goldwyn-Mayer Pictures,* 50 T. L. R. 581; *Shelby* v. *Sun Printing & Pub. Assn.,* 109 N. Y. 611; *Kimmerle* v. *New York Evening Journal, Inc.,* 262 N. Y. 99."

In determining whether a given publication has injured the person's reputation, the *current* effect of the statements is the decisive test. *Levy* v. *Gelber,* (1941), 175 Misc. (N. Y.) 746.

A publication may be libelous although it is "only the exuberant expression of meridional speech," per Mr. Justice Holmes, in *Gandia* v. *Pettingill,* 222 U. S. 452; or if "superlative vilification has * * * overleapt itself and become unconsciously humorous," per Mr. Chief Justice Taft, in *Balzas* v. *Porto Rico,* 258 U. S. 298.

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case—*Levy* v. *Gelber,* 175 Misc. 746, the same charge was held to be actionable, without any allegation of special damage. Similarly, to the contentions advanced herein by the petitioner, counsel for petitioner "believe the *Levy* case was improperly decided." (R. 20n). But the *Levy* case *is the law in New York.*

Nor is it necessary that all or even a majority hold the accused up to ridicule, contempt, etc. As Mr. Justice Holmes said:

> "Liability is not a question of a majority vote, • • • obviously an unprivileged falsehood need not entail universal hatred to constitute a cause of action. No falsehood is thought about, or even known to all the world. No conduct is hated by all. That it will be known by a large number, and will lead an appreciable fraction of that number to regard the plaintiff with contempt, is enough to do her practical harm • • •." *Peck* v. *Tribune Co., supra.*

The *Peck* case has been cited as authority in *Meyerson* v. *Hurlbut,* (App. D. C.), 28 F. 2d 232; *New York Evening Post Co.* v. *Choloner,* (C. C. A. 2), 265 F. 204, certiorari dismissed 252 U. S. 591; *Summit* v. *Zetterlund,* 287 F. 579; *Security Benefit Assn.,* v. *Daily News Pub. Co.,* (C. C. A. 8), 299 F. 445; *Kraft* v. *New York Herald Co.,* 6 F. 2d 644; *National Refining Co.* v. *Benzo Gas Motor Fuel Co.,* (C. C. A. 8), 20 F. 2d 763.

Applying these long established rules of the law of libel, laid down by this Court and the Courts of New York, we have but to examine the publication to be immediately impressed by the correctness of the Circuit Court of Appeals' decision.

(*B*) *Decisional Law On The Question.*

The Circuit Court of Appeals determined the questions presented by applying to the publication at bar the law of libel as it has been administered with consistent regularity by the courts of New York and as it always was and is now at common law.

As we have pointed out, any publication which exposes the accused to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or tends to induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their confidence and friendly intercourse in society, is libelous

per se. And this is true when the publication is capable of causing harm in *any one or more of the above respects.* See cases cited *supra,* p. 10. Moreover, the *same principles* apply to a libel on a public officer or a candidate for office, as to libels on private individuals, unless the statements fall within the strictly confined limits of fair comment and honest criticism. *Cartright* v. *Anderson,* 208 App. Div. 1.

That the Courts of New York have consistently upheld this rule is well illustrated in the case of *Sumner* v. *Liberty Pub. Corp.,* (1934), 240 App. Div. 118. Sumner, a Deputy Commissioner of Internal Revenue, was charged with discharging experienced employees and hiring new ones, who, it was charged, could not obtain work without "political drag." In holding the article to be libelous *per se* the Court ruled that the accusation that Sumner "accepted public office and proceeded to eliminate competent employees and to substitute political incompetents either at his own volition or at the dictation of others, charges the grossest kind of misfeasance and betrayal of his public trust."

"Such a charge must necessarily injure the plaintiff in his good name, reputation and in his professional standing."

The analogy is quite clear when it is considered that the respondent, while he did not eliminate competent employees, was actually accused of attempting to prevent the appointment of a competent person to public office (and there is no suggestion in the article that Mr. Freed was not qualified) merely because the candidate was of the Jewish faith.

Also well in point is the case of *People* v. *McWilliams,* (1940), 22 N. Y. Supp. 2d 571. Defendant was charged with disorderly conduct under Sec. 722, subd. 1 and 2, of the Penal Law of New York, the accusation stemming from the actions of the defendant (known as "the Yorktown Hitlerite") in attempting to arouse bitterness and hatred against Jews. McWilliams was found guilty. Subsequently, this decision was reversed, *McWilliams* v. *People,* 31 N. Y. Supp. 2d 37, but the reversal was predicated upon a point of evidence, not on the general proposition that a person

accused of fomenting religious hatred against Jews is not to be found guilty of disorderly conduct.

To be accused of religious and racial bigotry might not under every conceivable set of circumstances be considered defamatory, but words, not otherwise actionable, become actionable, when they touch the person defamed in his office —such words affect him in his official capacity. *Kinney* v. *Nash*, 2 N. Y. 177.

It has been held libelous *per se*, to charge a corporation counsel of a municipality with working against the interests of the community that employs him; that the municipality's progress is handicapped by him and that its government is run by a ring of which he is one. *Corwin* v. *Berkwitz*, 190 App. Div. (N. Y.) 952. And, where a judge was accused of rewarding an assemblyman, who had introduced a bill raising the judge's salary, with "rich references," the court held the words to be actionable *per se*, since they subjected the plaintiff to a loss of public confidence and respect. *Hickey* v. *Corson Mfg. Co.*, 108 N. Y. Supp. 884, aff'd., 127 App. Div. 946. See also, *O'Leary* v. *New York News Pub. Co.*, 51 App. Div. (N. Y.) 2.

Similarly, words published of a Representative in Congress, to the effect that he was a fawning sycophant, a misrepresentative in Congress, a grovelling office-seeker who had abandoned his post in Congress to pursue an office, were held to be libelous *per se*. *Thomas* v. *Croswell*, 7 Johns. (N. Y.) 264.

Subject of a close analogy to the case at bar is *Lunn* v. *Littaner, et al.*, 187 App. Div. 808. Plaintiff, a Representative in Congress, was accused of being an agent of a group of tanners to secure permission for them to transport skins from Cape of Good Hope to the United States, but that the authorities in Washington had prevented him from diverting shipping necessary for war uses to carry prohibited skins. The Court, in holding the article to be libelous *per se*, said:

> "Clearly such language, used in the height of war excitement, was intended to expose the plaintiff to con-

tempt, ridicule, and disgrace, and this is the essential element of libel—it is libel per se. To be held out as a 'profiteer', or the tool of 'profiteers'; to be charged with lending one's self to the promotion of private interests at the expense of the national welfare—is to invite the hatred and contempt of people generally. This would be true to a considerable extent in time of public tranquility; in the presence of an aroused public sentiment, when a mere suspicion of unpatriotic or even neutral attitude was likely to excite the hostility of the unthinking, such a charge could not fail to bring the plaintiff into disgrace, and might, in many communities, have invited violence against his person."

Here, the respondent is accused of racial and religious bigotry—of being a Jew hater—not in a time of "public tranquility", but at a time when all right-thinking people generally have in no uncertain terms denounced those at whom similar invective has been hurled,—at a time when the name of Hitler had become an anathema, due in large measure to his persecution of the Jews.

Comparable, in its legal significance to the instant case, is the decision in *Burnham* v. *Hornaday*, 223 N. Y. Supp. 750, order mod. 223 App. Div. (N. Y.) 218. In that case both plaintiff and defendant were members of a federal committee to regulate migratory birds. Defendant had charged plaintiff, who was president of a gunmakers association, of opposing a limitation of an open season, etc., in order to improve the gunmakers' element of profit. The court held that it was libelous to impute to an officeholder that he has been guilty of improper conduct in that office. Hence, the article at issue was libelous *per se*, as it was clearly calculated to injure the plaintiff's reputation and to degrade him in public estimation. Its tendency was to imply that plaintiff had acted hypocritically and corruptly in a position of public trust.

As to the liability of a publisher in spreading false charges concerning a public official, the Circuit Court of Appeals relied on the well established rule laid down in *Bennet* v. *Commercial Advertiser Assn.*, 230 N. Y. 125, (R.

30). In the *Bennet* case, plaintiff was an attorney and a Representative in Congress. He was accused of having inserted a "joker" in a bill whereby a former client of his would benefit, and that his actions in the matter were not for the best public interest. The Court held:

> "The libel law has never been confined to charges of illegality or lawbreaking. Any false accusation which *dishonors or discredits a man* in the estimate of the public or his friends and acquaintances or has a reasonable tendency so to do is libelous." (Emphasis supplied.)

And in holding the publication to be actionable *per se*, the Court stated:

> "An article may be libelous which does not charge a crime, but makes accusations, as in this instance, against a public official, which would show him unworthy of public trust and a betrayer of civic confidence."

Any charge of an act which is commonly regarded as an act, not committed by a person properly conducting himself in organized society and among civilized people, and which reflects upon his character in such wise as to expose him to ridicule and disgrace, is libelous *per se*. *Hayes* v. *Van Gelder*, 231 App. Div. (N. Y.) 663.

For other New York decisions involving public officials, see *Evans* v. *Flemming*, 229 N. Y. Supp. 293; *Cartright* v. *Anderson*, 208 App. Div. (N. Y.) 1; *O'Shaughnessy* v. *Morning Journal Assn.*, 24 N. Y. Supp. 609; *McIntyre* v. *Journal Co.*, 5 App. Div., (N. Y.) 609; *Woods* v. *Gleason*, 18 App. Div. (N. Y.) 401; *Edsall* v. *Brooks*, 26 How. Prac. (N. Y.) 426; *De Hoyos* v. *Thornton*, 259 App. Div. (N. Y.) 1; *Hamilton* v. *Eno*, 81 N. Y. 116.

Similarly, in other jurisdictions, it has been held libelous *per se*, to charge nepotism on the part of a public official, *Palmerlee* v. *Nottage*, 119 Minn. 351; or to charge that a postmaster, as political boss, favored a candidate, by ordering his name to go upon the ballot, although not endorsed

by the requisite number of signers, *Knapp* v. *Green*, 123 Kan. 550; or a sweeping charge of official favoritism and misconduct leveled against members of a public board as to each of the members, *Levert* v. *Daily States Pub. Co.*, 123 La. 594; or to accuse a colored government employee of treachery to his race, and working against their interest. *Bailey* v. *Howard*, 7 App. D. C. 184.

In *Tawney* v. *Simonson, Whitecomb & Hurley Co.*, 124 N. W. 229, (Sup. Ct., Minn.) a publication, headed, "Who are these men", was printed, as follows:

> "Tawney proved a falsifier of public documents by his misquotation upon the floor of Congress of a letter from the Secretary of the Treasury and his misstatement of facts with respect to an investigation and exposure in the Bureau of Engraving and Printing."

In holding the publication to be libelous *per se*, the Court said:

> "It imputed to plaintiff want of fidelity to public trust, grossly inconsistent with due fulfillment of official duty, tended to brand him with intellectual dishonesty, to subject him to the contempt and reprobation of right minded men."

The publication in the instant case imputes to respondent "want of fidelity to public trust" and brands him "with intellectual dishonesty." If this is not enough to subject him to "hatred, contempt and ridicule"—what more is needed?

Also, in *Sweeney* v. *Joliet Printing Co.*, Civil Action 1204 (unreported) D. C., N. D. of Ill., involving substantially the same publication as here in issue, Judge Holly stated:*

> "It is one of the fundamentals of our institutions that neither race nor creed shall disqualify one from holding public office. The article in question in effect charges plaintiff with being unworthy of his position

* Judge Holly in another case, *Sweeney* v. *Illinois Publishing and Printing Co.*, Civil No. 1201 (unreported), D. C., N. D. of Ill., held a publication, substantially the same as herein, to be actionable *per se*.

as a Congressman of the United States in making the Jewishness of Emerich Burt Freed a test of his qualifications to hold office.

"It is urged in defendant's Brief that plaintiff has suffered no pecuniary injury as a result of this publication. But pecuniary injury is not necessary. Libel is defined in this state as 'a malicious defamation, expressed either by printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation * * * of one who is alive, and thereby expose him to public hatred, contempt, ridicule *or* financial injury.' (Italics mine.) Criminal Code of Illinois, Sec. 177, Smith Hurd Ill. Anno. Stat., Sec. 402. This definition has been adopted by the Supreme Court of Illinois as the definition of libel in a civil action as well as criminal. *Ogren* v. *Rockford Star Printing Co.*, 288 Ill. 405."

See also, *Hassett* v. *Carroll*, 85 Conn. 23; *Bourreseau* v. *Detroit Evening Journal Co.*, 63 Mich. 425; *Com.* v. *Clap*, 4 Mass. 163; *Eikhoff* v. *Gilbert*, 124 Mich. 353; *Robbins* v. *Treadway*, 2 J. J. Marsh. (Ky.) 540.

The United States Circuit Court of Appeals for the Third Circuit, in a recent opinion, as yet unreported [*Sweeney* v. *Phila. Record Co., et al.* (decided Feb. 5, 1942) — F. 2d —] involving a consolidation of three cases filed by respondent against the Philadelphia Record Company, Chronicle and News Publishing Company and Steinman & Steinman, Inc., and growing out of a publication similar to the one at bar, did hold that the matter complained of was not libelous *per se*. However, the decision is easily distinguished from the one at bar in that it appears to have turned specifically upon a Section of the Constitution of Pennsylvania. In taking cognizance of the decision of the Circuit Court of Appeals for the Second Circuit, the Court stated:

"In the case just cited that tribunal passed upon the identical printed matter here under consideration and held it to be libelous *per se*. That there is a substantial difference between the libel law of Pennsylvania and that of New York in respect to public officials is well illustrated by the decision of the Supreme Court of

Pennsylvania in Commonwealth v. Foley, 292 Pa. 277, 141 A. 50. In the cited case the court points out that Article 1, Section 7, of the Constitution of Pennsylvania changes the common law of libel as to one charged with libeling a public official granting immunity where malice or negligence is not established to the satisfaction of the jury. The Constitution of New York contains no similar provision."

(C) Unambiguous Meaning of the Publication.

The article charges respondent with being part of "a hot behind-the-scenes fight" in Congress "to prevent the appointment of a Jewish judge"; the proposed appointee being one Emerich Burt Freed who was "on the verge of being elevated to the U. S. District Court"; that Congressman Sweeney's "violent opposition" had been aroused, and the "basis" of his opposition was the *fact* that "Freed is a Jew, and one not born in the United States"; that Freed was brought to this country at an early age and had been for a number of years a naturalized citizen. After reciting these *statements of fact,* the article concludes with the further *statement of fact* that, "Irate, Representative Sweeney is endeavoring to call a caucus of Ohio Representatives December 28 to protest against Freed's appointment." (R. 3).

As is readily seen, the alleged reasons advanced for respondent's opposition to Freed were not that the candidate was unqualified for office, but squarely on the point that *he was a Jew and a Jew not born in this country.*

The inescapable import of the words is that respondent opposed the appointment of a man because he was a Jew. Whether the word "Jew" was intended by the authors to mean the race or the religion is unimportant. The term is unqualified and in ordinary common parlance is accepted to mean either race or religion, or both. The natural and normal inference to be drawn from the fact that a man is opposed to the appointment of a person to office because that person is a Jew, is that such man is prejudiced against Jews, is bigoted, or dislikes Jews because they are Jews,—

or, in every day language, he is a "Jew-hater." It is to be noted that the opposition of Mr. Sweeney is said to be "violent," indicating that his prejudice, bigotry and hatred are fanatically severe.

As to the meaning to be ascribed to the publication, petitioner asserts that respondent "was publicly" (not stealthily) opposing Freed for appointment to office because of his Jewishness (Pet. Br. 40). This assertion is, of course, erroneous. The article, as published by petitioner, was clearly intended to be a choice bit of inside information: "A hot *behind-the-scenes* fight is raging • • •", (R. 3). (Emphasis supplied.)

Petitioner's parenthetical assertion that "Jews have not infrequently opposed Jews (R. 40), for public office, simply because the candidate was Jewish, is a little (stating it mildly) beside the point, or even beyond the realm of logic. Maybe, Jews have opposed Jews for public office, or Protestants have opposed Protestants, or Catholics have opposed Catholics, or Hindus have opposed Hindus, and so on through all religious denominations, but it taxes one's reason to suppose that the opposition was bottomed solely on the religious belief of the party.

Quoted at length and relied upon by petitioner as authority for an interpretation of the article contrary to that given by the Circuit Court of Appeals, are the decisions in *Sweeney* v. *Beacon Journal Pub. Co.*, 66 Ohio App. 475, app. dism. 138 Ohio St. 330, and *Sweeney* v. *Newspaper Printing Corp.*, 177 Tenn. 196. These decisions, and naturally the limited meaning given the article, turned on an application of the laws of the respective States of Ohio and Tennessee, which, under the *Erie Railroad* decision are of course not applicable to the New York case at bar. It may be well to point out, however, that in the *Beacon Journal case*, the Ohio Court stated that to be libelous *per se* words must impute a violation of *"the moral code or the law of the land."* There can be no serious contention that such is the law of New York.

Petitioner contends that the Circuit Court of Appeals committed error of law in making certain assumptions as to Father Coughlin's alleged anti-Semitism and thereby not adopting petitioner's interpretation of the article (Pet. Br. 41). This contention is obviously incorrect. The majority opinion made it manifestly clear that the Court's decision did not turn on whether Father Coughlin was or was not anti-Semitic—Father Coughlin was not in issue. In the paragraph immediately following the portion of the opinion quoted by petitioner, it is said:

> "But, all else aside, they (the words) do clearly attribute to him (respondent) the desire and purpose to try to prevent the appointment of Freed to the office mentioned for the reason that Freed is a Jew who was foreign born." (R. 29).*

A libelous publication may be, by a process of scholastic ingenuity, tortured into harmless insignificance, but the meaning so ascribed may well not be that which will be understood by the general reading public, which is, in the last analysis, the meaning which the law of libel weighs in determining the actionable quality of the words.

> "In the first place, the old rule that words are to be taken in mitiori sensu, that is, in their milder sense, in determining their actionable character, has long since been abandoned. The former strictness of the English law, requiring that a charge, to be slanderous, must be uttered with the technical precision of an indictment is no longer law. The ordinary signification in popular parlance of the statement made is the vital question in each case, or, in other words, it is a question of the natural and obvious meaning of the words used." *17 Ruling Case Law 312.*

The meaning the publisher placed on the words is not the controlling factor. *Corrigan* v. *Bobbs-Merrill Co.*, 228 N. Y. 458.

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* In a footnote (Pet. Br. 41n) petitioner invites attention to a District Court opinion in Texas (*Sweeney* v. *Caller-Times Pub. Co.*, 41 F. Supp. 163), in which the lower court made the same erroneous observation in reference to the inclusion of Father Coughlin in the consideration of the article.

While the past decade has witnessed a great part of the world enflamed by religious and racial hatred, rivaling if not surpassing, the days of the martyrs and the Dark Ages, our country has stood out as one of the last bulwarks against intolerance.

There can be no doubt but that, among the bloody works of Adolph Hitler, history will pose in bold relief, the tyrant's persecution of the Jews, which treatment of the Jews, to a great extent, was the cause of him being almost universally despised by the people of these United States,—and that even before the outbreak of the present war. These foreign happenings have revived in this country, among its citizens movements to take firmer measures to insure the continuance of tolerance, which we have so long enjoyed. Spokesmen, like Father Coughlin, who have been accused, rightly or wrongly, of fostering religious and class hatred have been held up to contempt.

The position that a widely circulated newspaper can, in a cosmopolitan city, accuse a Representative in Congress of being a racial and religious bigot and with violating his oath of office, without exposing such a representative of the people to the hatred and contempt of not only Jews but all true Americans, is untenable in logic, practice and experience. In other words, no one can sincerely urge this Court to adopt an ideology, that a newspaper can, for instance, with immunity, publish as a fact, although untrue, that Judge Doe of this Court, or any other Court, as Chief Judicial Spokesman of another, or otherwise, opposed the cause of a party because he was a Jew. The adoption of such a philosophy is beyond the conception of millions of citizens of this country who have founded their roots in tolerance. To contend, under established American ideology, that it is perfectly legitimate and American for a Representative in Congress,—who by his oath of office, in effect, swears to defend the principles of democracy,—to subscribe to racial bigotry by conspiring to oppose one for appointment to an office because he is a Jew, surely is another importation of foreign ideologies.

To advocate that this article is not libelous *per se*, the petitioner's position must be, in effect, this—although we (a large city newspaper) have daily expressed our sympathy for all oppressed peoples, including the Jews; although we have bitterly attacked all who are intolerant; although we have editorially solicited the help of all people to fight intolerance; although we have denounced all men in public life, sworn to uphold the principles of democracy, who fail to practice tolerance; we now claim immunity to falsely accuse Representative Sweeney of being intolerant.

The Circuit Court of Appeals properly considered contemporary happenings as to intolerance, (see *Sydney* v. *MacFadden Newspaper Corp.*, 242 N. Y. 208, and cases therein cited), in correctly construing the charges against respondent, at the time in question, particularly, to be libelous *per se*, (R. 30-31).

There is no basis for petitioner's contention that the printed words of ridicule or contempt "related solely to political views or arguments on questions of public interest." There is nothing in the libelous article relating to any "argument" of Representative Sweeney presenting his political "views on questions of public interest," or any other "question". No one reading the article could arrive at any such conclusion. It patently charges acts, constituting a bigoted opposition by Representative Sweeney to a man because of his religion and his race. The Representative was going to leave no stone unturned to stop Mr. Freed being made a Federal Judge.

Applying the test laid down by the Courts of New York State, in the cases cited, *supra*, p. 10, the question is, what affect this accusation had on the minds of the ordinary, reasonable and right-thinking citizens? Certainly, it must have engendered the hatred and contempt of substantially all Jewish citizens. We also contend that it likewise should and did affect all decent citizens, of all races and creeds.

The Court must take judicial notice of the fact that Jews comprise an important and respectable part of nearly every community; that at least an important and respectable part

of every community, other than Jews, consider it un-American to discriminate against a citizen of the United States because of his religion or his race; and that Article 6, Section 3, *Constitution of the United States,* provides:

> "No religious Test shall ever be required as a qualification to any Office or public Trust under the United States;"

It is to be noted that Representative Sweeney, by his oath of office, is sworn to support and uphold the Constitution.*

In this connection it is also worthy of note that the Founding Fathers were deeply cognizant of the powerful and destroying influences of those practitioners of religious hatred. In the words of Justice Story:

> "The framers of the Constitution * * * knew that bigotry was unceasingly vigilant in its stratagems to secure to itself an exclusive ascendency over the human mind, and that intolerance was ever ready to arm itself with all the terrors of the civil power to exterminate those who doubted its dogmas or resisted its infallibility." *Story's Commentaries on the Constitution,* (5th Ed.), Sec. 1847.

To the millions of people, citizens of our government who respect and adhere to the Constitution of the United States, and *who consider themselves tolerant of all races and creeds and demand the same tolerance of their public officials,* such a charge must necessarily make the respondent contemptible and unfit to hold such public office.

Undoubtedly the publication induced that vast majority of our citizens, who are dedicated to the cause of tolerance of race and creed, to look upon Mr. Sweeney with contempt. Such an accusation placed the respondent in disgrace and certainly tended to deprive him of the confidence and friendly intercourse of his constituents. Such was necessarily the

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* *Rules and Manual of the U. S. House of Representatives,* 77th Congress, Page 71, Sec. 229.

natural and normal tendency of this publication. Such would follow even if Mr. Sweeney were but a private citizen. When spoken of him as a public official, as the article expressly does, the shame, hatred, degradation and disgrace is heightened and enhanced. While there might be some "privilege" for respondent, as a private citizen, to oppose the appointment of a Jew, Mr. Sweeney, as a duly elected representative of the people, in Congress, sworn to represent all equally and fairly, could claim no prerogative.

There can be no question but that the Circuit Court of Appeals, therefore, correctly held the article to be actionable *per se* and properly remanded the cause for trial on the merits.

Point II.

The English Rule is Directly in Accord with the Decision of the Circuit Court of Appeals.

A search of the English language reports has disclosed but one decision presenting like imputations as those charged to the respondent. It appears to be squarely in point. The case is *De Stempel* v. *Dunkels* (decided 1938), 1 All. E. R. 238, 54 T. R. L. 289; aff'd. sub. nom. *Dunkels* v. *De Stempel* (1939), 55 T. L. R. 655, H. L. A few of the facts may be pertinent.

The action was for slander and for breach of contract. Plaintiff was the Baron Victor De Stempel, a Russian emigre, married to the stepdaughter of the defendant, Walter Dunkels, who was of the Jewish faith. The defendant was a member and leading director of the Diamond Corporation of England, and his cousin Otto Dunkels, the employer of the plaintiff, was head of the Corporation. Differences arose between the plaintiff and his wife (Walter Dunkel's stepdaughter), ultimately resulting in the defendant lodging accusations against plaintiff with Otto Dunkels. Among the charges made was "Victor is a Jew-hater." For our purposes here, this need be the only accusation considered.

(A) *Appellation of "Jew-Hater" is Defamatory, Per Se.*

At the trial, the jury found the statement "Victor is a Jew-hater" to be defamatory and awarded damages.

When the trial judge overruled the verdict, the Court of Appeals held that to say "Victor is a Jew-hater" was defamatory *per se* and special damages need not be pleaded, or shown. (It is interesting to note that defendant's counsel, while he differed on other points, observed that he "could not contend that the words, 'Victor is a Jew-hater' were not capable of a defamatory meaning.")

While dissenting on certain issues of the case, Slesser, L. J., indicated his accord with the holding that the words complained of were defamatory *per se,* when he said:

> "As to this alleged slander, Sir Patrick Hastings (def's. counsel) admitted that, in the primary sense, it was capable of a defamatory meaning. He said that he was constrained to agree with the view, which I had expressed during the argument, that to say of any man that he was a 'hater' of any person or class of persons was capable of a defamatory meaning. Hatred of anything but wickedness may well be considered to be a vice or a sin. In the Litany where a public recognition of morality and social obligation may properly be sought, there is prayer for delivery from hatred, malice, and all uncharitableness, and, in a Christian country such as England, to say that a man is possessed of hatred is, in my opinion, 'likely to tend to lower him in the estimation of right-thinking members of society generally,' to quote the test mentioned by Lord Atkin in Sim v. Stretch (1936, 2 All E. R. 1237). In Ireland it has been held defamatory to say of a man that he is intolerant: Teacy v. McKenna (1869 I. R. 4 C. L. 374). In New Zealand, it has been held defamatory to say of a man that he has been guilty of unbrotherly conduct: Campbell v. Payton (1889, 17 N. Z. L. R. 91). I would add to the category the statement that a man is afflicted by hatred."

On the same question, Scott, L. J., stated:

> "I deal first with the slander alleged in para. 7 of the statement of claim: 'Victor is a Jew-hater.' Sir Patrick

Hastings (def's. counsel) felt himself unable to argue that these words were incapable of a defamatory meaning. Both the senior members of the court agree with Sir Patrick, and so do I. *The words seem to me obviously defamatory.* To say that a man hates a particular race or class of people is to allege, at the very least, a character which is warped and unlikely to be impartial." (Emphasis supplied.)

While the De Stempel case involved but the spoken word, how more reprehensible is the written word, given permanence in print? The distinction that makes libel the more infamous than the tort of slander was appropriately marked by Mr. Justice Cardozo in *Ostrowe* v. *Lee*, 256 N. Y. 36, as follows:

"The schism in the law of defamation between the older wrong of slander and the newer one of libel is not the product of mere accident (citing authorities). It has its genesis in evils which the years have not erased. Many things that are defamatory may be said with impunity through the medium of speech. Not so, however, when speech is caught upon the wing and transmuted into print. What gives the sting to the writing, is its permanence of form. The spoken word dissolves, but the written one abides and 'Perpetuates the scandal.' "*

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* That this sound distinction not only obtains in this country, but also in England, may be noted in the following quotation from the treatise of one of the more renowned of English authorities:

"So long as a man's power of effecting mischief is limited to his own immediate and personal efforts, however violent and noxious they may be, against the persons or property of others, the evil which he works must be of a local and limited nature; but when it is extended by exerting a pernicious and wicked influence over the understandings of mankind, through the medium of the press, its power is bounded neither by time nor place; any one vicious and unprincipled mind may, as it were, be brought into contact with, and is enabled to exercise its influence over those millions; thus even a single individual, as if invested with a kind of mischievous ubiquity, is enabled to disseminate blasphemy, sedition and immorality, to the remotest borders of the realm, and the very mass of society may thus be exposed to the danger of contamination and corruption." *Folkard's Starkie on Slander and Libel*, 4th Ed., Page 8.

It would seem a biting paradox if the law of the State of New York with its Jewish population of some 2,260,208 out of some 4,770,647 Jews in the United States, regards statements kindred to "Jew-hater" as benign benedictions, while England with a Jewish population slightly in excess of 300,000, justly condemns and holds up to the rigors of the law those making false accusations of the kind.*

Point III.

The Publication Does Not Come Within the Purview of Fair Comment and Honest Criticism.

The rule of "fair comment and honest criticism," is the single feature that distinguishes libels on private individuals and those whose words and acts are constantly before the public. The rule is not limited to public officials, but applies as well to novelists, actors, athletes and a host of others whose everyday acts are properly "newspaper copy."

Moreover, this defense does not in any particular, affect the *libelous quality of the words,* it merely affords to the defendant a means of escaping liability for the publication if he can bring himself within the rule.

(A) *The New York Rule*

Because of the scarcity of a specific definition of "fair comment," we quote Gatley in his notable work on libel and slander, where he states what appears to be the overwhelming weight of authority:

> "There is no specific definition of fair comment; but from the authorities it is clear that, in that a comment may be fair, the following conditions must be satisfied: (a) *It must be based on facts truly stated.* (b) It must not contain imputations of corrupt or dishonorable motives on the part of the person whose conduct or work is criticized save in so far as such imputations are war-

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* Figures from "*Jewish Statistical Bureau of Synagogues of America*" (1937).

ranted by the *facts*. (c) It must be the honest expression of the writer's real opinion." (Emphasis supplied.) *Gatley on Libel and Slander*, (1938), 3rd Ed., Page 378.

Under the New York authorities, this privilege to comment upon matters of public concern is strictly limited to criticism or opinion, and is not applicable to *misstatements of fact*. *Briarcliff Lodge Hotel, Inc.* v. *Citizen Sentinel Pub. Inc.*, 259 N. Y. 106; *Foley* v. *Press Pub. Co.*, 226 App. Div. (N. Y.) 535; *Cohalan* v. *New York World-Telegram Corp.*, 172 Misc. (N. Y.) 1061; *Sherman* v. *International Publications*, 214 App. Div. (N. Y.) 437; *Hoey* v. *N. Y. Times Co.*, 138 App. Div. (N. Y.) 149, Annotations, A. L. R. 412.

As it has been so aptly stated, "the assertion of a *fact* is not a *comment* at all." *Bingham* v. *Gaynor*, 141 App. Div. 301, aff'd. 203 N. Y. 27.

The *known* or *admitted* acts of a public official are open to fair and honest criticism, which is protected under qualified privilege. But the privilege is *qualified:*

> " • • • because it does not extend beyond fair and honest comment and criticism. It is no protection to the writer if he therein makes *false statements* or unjustifiable inferences. In making such a communication the writer makes *statements of fact* at his peril, and, if the statements made therein are libelous and untrue, the fact that they are made about a *public officer* does not exempt the writer on the ground of privilege." *Bingham* v. *Gaynor*, 203 N. Y. 27. (Italics supplied.)

A few of the very many cases, in accord with the above proposition, are: *De Hoyos* v. *Thornton*, 259 App. Div. (N. Y.) 1; *Cartright* v. *Anderson*, 208 App. Div. (N. Y.) 1; *Lunn* v. *Littaner*, 187 App. Div. (N. Y.) 808; *Hoey* v. *New York Times*, 138 App. Div. (N. Y.) 149; *Hamilton* v. *Eno*, 81 N. Y. 116; *Powers* v. *Dubois*, 17 Wend. (N. Y.) 63; *Littlejohn* v. *Greeley*, 13 Abb. Prac. (N. Y.) 41.

The majority opinion of the Circuit Court of Appeals correctly applied the rule as it relates to public officials, the

same rule that was declared in the noteworthy case of *Hamilton* v. *Eno*, 81 N. Y. 116, where it was said:

> "One may in good faith publish the truth concerning a public officer; but if he states that which is false and aspersive, he is liable therefor, however good his motives. A person in public office is no less to be protected than one who is a candidate for public office; and the law of libel must be the same in each case. * * * Yet it is the law of this state that to accuse a candidate for public office of an offense is not privileged, though the charge was made without evil motive, and in the exercise of a political right. * * * We are of the opinion that the official act of a public functionary may be freely criticized, and entire freedom of expression used in argument, sarcasm, and ridicule upon the act itself; and that then the occasion will excuse everything but actual malice and evil purpose in the critic. We are of the opinion that the occasion will not of itself excuse an aspersive attack upon the character and motives of the officer; and that, to be excused, the critic must show the truth of what he has uttered of that kind."

(B) *The Rule Generally.*

That the New York rule generally obtains may be noted from the marked similarity to the language in the *Hamilton* case, used by Judge Taft, later Chief Justice of this Court, in the great landmark case of *Post Publishing Co.* v. *Hallam*, 59 F. 539. Judge Taft, in an opinion undoubtedly representing the overwhelming weight of authority both in this country as well as England, reasons:

> "The existence and extent of privilege in communications are determined by balancing the needs and good of society against the right of an individual to enjoy a good reputation when he has done nothing which ought to injure it. The privilege should always cease where the sacrifice of the individual right becomes so great that the public good to be derived from it is outweighed. Where conditional privilege is extended to cover a statement of disgraceful fact to a master concerning a servant or one applying for service, the privilege covers a bona fide statement, on reasonable ground, to the

master only, and the injury done to the servant's reputation is with the master only. This is the extent of the sacrific which the rule compels the servant to suffer in what was thought to be, when the rule became a law, a most important interest to society. But if the privilege is to extend to cases like that at bar, then a man who offers himself as a candidate must submit uncomplainingly to the loss of his reputation, not with a single person or a small class of persons, but with every member of the public, whenever an untrue charge of disgraceful conduct is made against him, if only his accuser honestly believes the charges upon reasonable ground.

"We think that not only is such a sacrifice not required of every one who consents to become a candidate for office, but that to sanction such a doctrine would do the public more harm than good. We are aware that public officers and candidates for public office are often corrupt, when it is impossible to make legal proof thereof, and, of course, it would be well if the public could be given to know in such a case what lies hidden by concealment and perjury from judicial investigation. But the danger that honorable and worthy men may be driven from politics and public service by allowing too great latitude in attacks upon their characters outweighs any benefit that might occasionally accrue to the public from charges of corruption that are in fact true, but are incapable of legal proof. The freedom of the press is not in danger from the enforcement of the rule we uphold. No one reading the newspaper of the present day can be impressed with the idea that statements of fact concerning public men, and charges against them, are unduly guarded or restricted, and yet the rule complained of is the law in many of the states of the Union and in England."

Newspapers have no peculiar privilege in commenting on or criticizing public men's public acts. *Lindsey* v. *Evening Journal Association*, 10 N. J. Misc. 1275; nor, is a newspaper privileged to publish a libelous charge about a public official respecting his conduct in office, *Kirkland* v. *Constitution Pub. Co.*, 38 Ga. App. 632; and a publication containing insulting, contemptuous phrases, or false and libel-

ous statements of fact is not privileged, even though it concerns the acts of public officers, *Finnegan* v. *Eagle Printing Co.*, 173 Wis. 5. See also the opinion of Mr. Justice Holmes in *Burt* v. *Advertiser Newspaper Co.*, 154 Mass. 238. To the same effect: *Davis* v. *Shepstone*, 11 App. Cas. (England) 187; *Arizona Pub. Co.* v. *Harris*, 2 Ariz. 446; *Pierson* v. *Times Picayune Pub. Co.*, 148 La. 817; *Van Lonkhauyzen* v. *Daily News Co.*, 203 Mich. 570; *Dumphiny* v. *Buhne*, 153 Cal. 757; *Sweeney* v. *Baker*, 13 W. Va. 158; *Smith* v. *Burrus*, 106 Mo. 94; *Williams* v. *Saunders*, 133 Va. 156; *State* v. *Haskins*, 109 Ia. 656; *Russel* v. *Washington Post Co.*, 31 App. D. C. 277.

With marked clarity and pungent reasoning, Van Vechter Veeder, in 23 *Harvard Law Review*, 413, 419, summarizes:

> "The whole doctrine of immunity in defamation is based upon public policy, and the only valid objection to protecting statements of fact in relation to candidates for elective office rests upon such considerations. It is the conviction that such a doctrine would do the public service more harm than good. The danger that honorable and worthy men may be driven from politics and public service by allowing such latitude in attacks upon personal character outweighs any benefits that might accrue to the public. Such license would create a disinclination for public life on the part of honorable men by making them feel that it was incompatible with wholesome self-respect and decent reputation; it would drive men of sensibility away from its opportunities in sheer disgust, and leave public employment to callous and self-seeking adventurers. It seems plain that immunity in fair comment extends the utmost protection in matters of public interest that is compatible with a proper regard for personal rights."

(C) *Comment on Established Facts and Fictitious Facts Sharply Distinguishable.*

Petitioner asserts that in respect to comment and criticism, the law of libel, as judicially interpreted by the courts of New York, makes no distinction between comments based upon acts untrovertibly true and those acts which are

untrue. (Pet. Br. 13n.) This assertion is totally erroneous and predicated upon a mistaken interpretation of the very cases upon which petitioner relies. To illustrate, we have but to note the facts in *Tanzer* v. *Crowley Pub. Corp.*, 240 App. Div. (N. Y.) 203, which decision petitioner appears to lean upon heavily (Pet. Br. 6, 13, 17, 24). In the *Tanzer* case, plaintiff was a Mayor, in which capacity he had appointed a city attorney. Defendant, in *commenting on the appointment*, attributed it to dishonorable motives. The fact that the paintiff had appointed the city attorney was an *established truth*. Hence, the defendant brought itself within the rule of fair comment and criticism by commenting on *facts truly stated*, even though the comment itself was allegedly *false*. Similarly, in *Hills* v. *Press Company*, 122 Misc. (N. Y.) 212 (commenting on established *acts* of plaintiff, though the comment was allegedly false); *Gardner* v. *Home Life Pub., Inc.*, 237 App. Div. (N. Y.) 200 (plainly within the rule, and moreover containing nothing of a vicious or disgraceful character), *Cartwright* v. *Anderson*, *supra* (comment on "wet" propensities of a *candidate* for office, but the charge of intending to align with gamblers, held libelous *per se*), *DeHoyos* v. *Thornton*, *supra* (mere allegations of waste and extravagance in official administration, obviously comment and criticism, but, charge of being dictated to by gamblers held libelous *per se*). In *Rossiter* v. *New York Press Co.*, 141 App. Div. (N. Y.) 339, plaintiff had been an expert witness for the city. Comment and criticism as to whether the services which he *actually rendered*, were worth what he was paid, was correcly held within the rule of fair comment.

An excellent example of the boundaries of fair comment may be found in the recent decision in *Hall* v. *Binghamton Press Company* (decided March 4, 1942), —— App. Div. (N. Y.) ——. Defendant in that case published criticism of the vote of plaintiff, a Representative in Congress, on what is known as the "lend-lease" bill. It was an *established fact* that Hall had actually voted on the bill. There-

fore, his vote was properly the subject of legitimate comment and criticism. Because the *act* of voting was a truly stated *fact*, the ensuing comment could have been false and yet come within the rule of "fair comment and criticism." It may be noted that, even in the Hall case, affording on its fact almost unquestioned protection under the defense of "fair comment and criticism," the decision was by a divided Court, with two of the judges holding that the publications complained of were susceptible of a libelous meaning and should be submitted to the jury.

In the case at bar, the publication does not *comment* or *criticize* any established *act* of respondent, either as a Representative in Congress or even in his private capacity. The article charges that there was "a hot behind-the-scenes fight" over the proposed appointment of Mr. Freed; that "this has aroused the violent opposition" of respondent; that, the basis of his "opposition is the fact that Freed is a Jew," and that "Irate, Representative Sweeney is endeavoring to call a caucus of Ohio Representatives," on a *date certain*, to protest against the appointment of Freed (R. 3). Each of the charges are set forth as *established facts*. Respondent pleaded the *falsity* of each and all of them (R. 13). Hence, they became issues in the action and the subject of proof at the trial.

The charges against Representative Sweeney do not refer to his "state of mind" or "opinion," as petitioner asserts, but relate solely to his alleged *acts*, in a purported effort to stop the appointment of Mr. Freed, solely because Mr. Freed was a Jew.

The accusations directed at respondent are nothing else than *statements of fact*.

As we have seen, the article in each of the cases petitioner relies upon was "comment" and "criticism," which, although allegedly false, was based upon established *acts* of the person criticized. Consequently, they afford no precedent for the case at bar.

The utter fallacy of petitioner's contention lies in the marked failure to make any distinction whatsoever between

comment and criticism, based upon acknowledged *acts* of respondent, and comment and criticism based upon *false* statements of fact. Simply because an individual holds public office, it is not a logical sequitur that baseless charges such as thief, murderer, adulterer, "Jew-hater", or of whatever nature, tending to hold him up to the scorn and contempt of decent people, may be hurled at him with impunity, under the guise of "fair comment and criticism."

(D) *In Any Event, Under the Facts of the Case, the Defense of Fair Comment is Properly a Jury Question.*

Whether or not the allegations in the publication, are allegations of fact or expressions of *opinion*, and, if expressions of opinion, (which we contend they are definitely not), whether such expressions are fairly warranted by facts truly stated, are questions for the jury to decide under proper instructions from the trial judge. In the case of *Foley* v. *Press Publishing Company*, 226 App. Div. (N. Y.) 535, (involving an officer of the United States Navy), at page 546, the court stated:

> "It is a question for the jury to decide, subject to the direction of the judge, whether in the particular case the defendant's allegations are allegations of fact or expressions of opinion, and, if expressions of opinion, whether such expressions of opinion are fairly warranted by the facts truly stated or referred to."

And, in *Cohalan* v. *New York World-Telegram Corp.*, 172 Misc. (N. Y.) 1061, (involving an official referee of the New York Supreme Court), the Court said:

> "The question of whether an editorial writer has exceeded fair criticism, is by the weight of modern appellate authorities, properly submitted to the jury, even where there may be a doubt." Citing *Kenna* v. *Daily Mirror, Inc.*, 250 App. Div. 625, aff'd. 276 N. Y. 483; *Triggs* v. *Sun Printing & Publishing Assn.*, 179 N. Y. 144; *McInerney* v. *New York World Telegram Corp.*, 166 Misc. 266.

Here, the charges directed at Representative Sweeney are stated as *facts*, not as *opinions* of the publisher, and even if they might be construed as opinions or criticism of Mr. Sweeney, by the petitioner, there are no *facts* stated or referred to on which such opinions or criticism could be predicated, and, in any event, if there be such facts, it is for the jury to decide whether or not they are *truly stated.*

Point IV.

Constitutional Guarantees Afford No Protection for the Abuse of Freedom of the Press.

"Freedom of the press" is a phrase invariably resorted to by every publisher-defendant, when brought to the bar to answer for its abuse. This "freedom", *properly exercised*, forms one of the commonplace panegyrics of every free government. But punishment for the abuse of the privilege is so well established and so manifestly good sense as to hardly need citation of the books.

The individual's right to a good reputation, when he has done nothing to cause it to be otherwise, in no way encroaches upon or curtails the constitutional guaranty of the liberty of the press. It does not assail the liberty of the press, but rather fortifies it by purging it of its iniquities.

As stated in *Cooley's Constitutional Limitations*, (7th Ed.), p. 883:

> "The constitutional liberty of speech and of the press, as we understand it, implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character may be a public offense, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals.
>
> "That this constitutional protection shields no one from responsibility for abuse of this right. To hold that it did would be a cruel libel upon the Bill of Rights itself. . . . Equally numerous and strong are the de-

cisions that obscene publications are without the protection of this provision of our Constitution.

"Liberty in all its forms and assertions in this country is regulated by law. It is not an unbridled license. Where vituperation or licentiousness begins, the liberty of the press ends."

And, in 32 L. R. A., 829n, it is stated:

"The protection of free speech under the Constitution may often be claimed *when the only question really in dispute is the question whether the language in question is libelous or slanderous.* If it is, the constitutional provision does not apply. This is made evident by all the decisions.

"That libel and the punishment of libelers do not infringe the constitutional freedom of the press, is, in substance, declared in Morton v. State, 3 Tex. App. 510; Story v. People, 79 Ill. 45; Runkle v. Meyer, 2 Am. Dec. 393; State v. Morrill, 16 Ark. 384; Haskell v. Faulds, 17 Mont. 140; Respublica v. Dennie, 2 Am. Dec. 402; Cincinnati Gazette Co. v. Timberlake, 78 Am. Dec. 285; Jones v. Townsend, 21 Fla. 431; Sweeney v. Baker, 13 W. Va. 182; and in all other cases in which the question has been presented." (Italics supplied.)

In the broadest interpretation of the constitutional immunity, the freedom of the press and of speech does not include that which is generally recognized as harmful, such as libelous, obscene, or seditious matter, or that which was deemed harmful according to common-law standards; nor does it afford an absolute right, without subsequent responsibility to speak, write, or print whatever one may please. *Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U. S. 287; *Whitney* v. *California,* 274 U. S. 357; *Gitlow* v. *New York,* 268 U. S. 652; *Gilbert* v. *Minnesota,* 254 U. S. 325; *Abrams* v. *United States,* 250 U. S. 616; *Schenck* v. *United States,* 249 U. S. 47; *Frohwerk* v. *United States,* 249 U. S. 204; *Debs* v. *United States,* 249 U. S. 211; *Robertson* v. *Baldwin,* 165 U. S. 275; *In Re Rapier,* 143 U. S. 110; *Ex Parte Jackson,* 96 U. S. 727.

As was said by Mr. Chief Justice Hughes, in *Near* v. *Minnesota*, 283 U. S. 697, 715:

> "But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions."

And, by Mr. Justice Murphy in *Chaplinsky* v. *State of New Hampshire*, decided March 9, 1942, ... U. S. ....:

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

And, by Mr. Justice Roberts in *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 133:

> "The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel." *

See also 16 C. J. S., Sec. 213, P. 630; *Post Pub. Co.* v. *Hallam*, (C. C. A. 6th), 59 F. 539; *KVOS* v. *Associated Press*, (D. C. Wash.), 13 F. Supp. 910; *Gitlow* v. *Kiely*, (D. C., S. D., N. Y.) 44 F. 2d 227; *Chamber of Commerce* v. *Fed. Trade Commission*, (C. C. A. 8th) 13 F. 2d 673; and, *Trinity Methodist Church, South* v. *Fed. Radio Commission*, (D. C. App.), 62 F. 2d 850, in which the Court affirmed the action of the Commission in denying a broadcasting license in view of previous broadcasts which

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* As one famed publisher is reported to have said: "freedom of speech * * * is the right of every man as by it he does not hurt or control the right of another * * *." *"Benjamin Franklin,"* by Carl Van Doren (p. 27).

charged judges with corruption, maligned public officials and made attacks upon Jews and Roman Catholics.*

That the framers of the Constitution intended there be just punishment for the abuse of the freedom of the press is evidenced from the early writings of Mr. Justice Story. The famed jurist in his *Commentaries on the Constitution*, at Section 1880, (5th Ed.) states:

> "That this amendment was intended to secure to every citizen an absolute right to speak, or write, or print whatever he might please, without any responsibility, public or private, therefor, is a supposition too wild to be indulged by any rational man. * * * Civil society could not go on under such circumstances. Men would then be obliged to resort to private vengeance to make up for the deficiencies of the law; and assassinations and savage cruelties would be perpetrated with all the frequency belonging to barbarous and brutal communities. It is plain, then, that the language of this amendment imports no more than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever without any prior restraint, so always that he does not injure any other person in his rights, person, property, or reputation; and so always that he does not thereby disturb the public peace, or attempt to subvert the government. It is neither more nor less than an expansion of the great doctrine recently brought into operation in the law of libel, that every man shall be at liberty to publish what is true, with good motives for justifiable ends. And with this reasonable limitation it is not only right in itself, but it is an inestimable privilege in a free government. Without such a limitation, it might become the scourge of the republic, first denouncing the principles of liberty, and then, by rendering the most virtuous patriots odious through the terrors of the press, introducing despotism in its worst form."

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* In the case of *Sweeney* v. *Joliet Printing Co.*, Civil No. 1204, in D. C., Northern Div., Ill. (unreported), involving substantially the same article as here in issue, Judge Holly stated: "Freedom of the press does not mean irresponsibility for newspaper publishers. And that freedom will best be preserved through the exercise of care by the publishers in verifying slanderous statements before publishing them."

And, again at Section 1884, (p. 673):

> "There is a good deal of loose reasoning on the subject of the liberty of the press, as if its inviolability were constitutionally such that, like the King of England, it could do no wrong, and was free from every inquiry and afforded a perfect sanctuary for every abuse; that, in short, it implied a despotic sovereignty to do every sort of wrong, without the slightest accountability to private or public justice. Such a notion is too extravagant to be held by any sound constitutional lawyer with regard to the rights and duties belonging to governments generally, or to the State governments in particular. If it were admitted to be correct, it might be justly affirmed that the liberty of the press was incompatible with the permanent existence of any free government."

Petitioner's contention that the purport of the decision of the Circuit Court of Appeals, *if* embodied in a statute would be violative of the constitutional guarantees, is pure fantasy. In the words of Mr. Justice Roberts in *Associated Press* v. *National Labor Relations Board, supra,* (p. 132):

> "Courts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances."

The cases relied on by petitioner, in attempting to show a violation of the constitutional guarantees, are not opposed to oft repeated pronouncements of the Courts of New York State and followed by the majority of the Circuit Court of Appeals in this case. It will be observed that not one of the decisions of this Court, as cited by the petitioner, involved a *civil suit for libel.* On the contrary, the cases generally pertain to statutes and ordinances, which were struck down as involving an express prohibition of free speech or, through an arbitrary licensing system, sought to accomplish the same end. This is true of *Hague* v. *C. I. O.,* 307 U. S. 496, a public assemblage controversy; *Thornhill* v. *Alabama,* 310 U. S. 88, an anti-picketing ordinance; *Cant-*

well v. *Connecticut*, 310 U. S. 296, as to Count Three which dealt with a licensing ordinance held to be directly restrictive of freedom of speech and religion. And, in *Bridges* v. *California*, 314 U. S. ..., 86 L. Ed. 149, involving a Court's power to punish for criminal contempt, the facts were obviously in no way analogous to the facts at bar.

It seems clear from all the authorities, that the individual's right to his reputation is as basic as the right of a free press. And to permit actions for defamation is not a limitation on the freedom of the press, but merely a equitable curtailment of the power to abuse that right when it traduces the character of innocent people—whether they be public officials or otherwise. The right to a decent reputation does not push forward the frontier of human freedom, but repels the assault on human liberty; it enters on the conquest of no new territory, but sets up its lawful sovereignty over territory long ago acquired. The rights of a free press and of reputation creates no schism in the law, but unites and solidifies the eternal and imperishable principles of right, upon which all law and justice must be deemed to be founded.

It is not whim or caprice, nor fancied or imagined wrongs, that drives all to cherish a good reputation, nor, is it a dream of theorists, pamphleteers and publicists, but the assertion of a claim and a demand for justice by every self-respecting person.

His claim to his reputation makes no harsh or imperious demands, difficult or impossible to satisfy reasonably, nor does it prescribe lines of action or a course of conduct for the press that amounts to censorship—or even the shadow of it. The liberty of the press is not involved. To cleanse the stream of its pollution stops not the flow of its waters. "Freedom of the press" is not a license to abuse the privilege, but recklessness in the use of a privilege has often brought the user into trouble, while the privilege itself remained unimpaired.

We need search no further than world events of the past few years to be reconciled to the fact that license never

created either justice or liberty, but has been repeatedly the cause of the overthrow and loss of both.

Human freedom is not enlarged or is the liberty of the race enhanced by extending judicial license to the libeler to falsely attack the reputation of the public official on the ground that he is "fair game." To be forever pilloried in the files of petitioner's newspaper and in the minds of the reading public, as a "Jew-hater," is not a contribution to the freedom of the press, but a sacrifice to its license, greed and tyranny.*

CONCLUSION.

Extracts from publications concerning individuals from the time of George Washington down to the present day are set out in the appendix to petitioner's brief, (pp. 49-60). We maintain that they have no proper place in the case at bar, for it is obviously impossible to determine the collateral issues that would arise if an action for libel had been commenced in each instance. Many of the statements appear to be clearly libelous, but on the other hand many of them are probably *true*. In any event, the commonplace homily that "two wrongs do not make a right," seems to be pertinent.

It is not persuasive to a decision herein, that George Washington, Abraham Lincoln, and others in public life did not seek legal relief for the defaming of their reputations.*

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* As it has been so aptly said: "The only way to preserve the liberty of the press is to punish it for its prostitution." *Cooper's Notes on Justinian*, p. 636.

* It may be observed that ex-President Hoover allowed "scurrilous material", published in the "Washington Merry-Go-Round" to pass by unnoticed, but it is said that his amusement was greatly increased by the discharge of the authors from their respective newspapers. As stated by one of the attorneys for the petitioner herein: "These young authors may learn in time that there are other answers to a libel than an action for damages in a court of law." *"Hold Your Tongue!"*, by Morris Ernst and A. Lindey. But, General Douglas MacArthur was apparently not so content as appears from the suit filed against the authors of the "Merry-

The law of libel did not go into oblivion because of circumstances which might well have precluded the maintenance of a successful suit in each instance.

It is submitted that, the publication complained of unquestionably held respondent up to the scorn, contempt and ridicule of all right-thinking people; that, it charged him not only with anti-Semitism but with practicing religious and racial intolerance in connection with his official office; that, it accuses him of *acts* not founded upon *facts truly stated* and is accordingly neither *comment* nor *criticism;* that, the constitutional guarantees of free speech and of the press is not a license to abuse the privilege; that the decision of the Circuit Court of Appeals is not only in accord with all established precedents of both this Court, and the New York Court of Appeals, but is sound in logic and reason, and should therefore be affirmed.

Respectfully submitted,

JOHN O'CONNOR,
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WILLIAM F. CUSICK,
WILLIAM F. CONROY,
JOSEPH D. SCHENCK.

Go-Round" in 1934, in the United States District Court for the District of Columbia (Law 84010), in which the distinguished General asked for damages in a stupendous amount for alleged defamation.

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MOTION AND BRIEF OF AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 745

THE SCHENECTADY UNION PUBLISHING COMPANY,

Petitioner,

vs.

MARTIN L. SWEENEY,

Respondent.

On Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

EDMUND D. CAMPBELL,
822 Southern Building,
Washington, D. C.,
Attorney for
American Civil Liberties Union.

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MARTIN L. SWEENEY,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

MAY IT PLEASE THE COURT:

The undersigned, as counsel for the American Civil Liberties Union, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae*. Special reasons in support of this motion are set out therein.

Dated, March 2, 1942.

EDMUND D. CAMPBELL,
822 Southern Building,
Washington, D. C.,
Attorney for
American Civil Liberties Union.

BRIEF ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE

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The American Civil Liberties Union is a non-partisan national organization with many members resident in the District of Columbia. Its objects are defined in its charter "to maintain throughout the United States and its possessions the rights of free speech, free press, free assemblage and other civil rights and to take all legitimate action in furtherance of such purposes."

Its position has always been that the frontiers of the right of free speech are limited by the right to sue for libel. The only issue, therefore, with which the American Civil Liberties Union can properly be concerned is where the line should be drawn. It is particularly concerned with the assertion of the respondent here that the statements made by the petitioner of and concerning him are libelous *per se*.

It is the considered opinion of the American Civil Liberties Union that it is not libelous *per se* to say of a public

official or one who engages in public discussion that he holds one opinion or another on a public issue. It is submitted that the ruling of the District Court was in all respects correct and that the decision of the Circuit Court of Appeals should be reversed.

The American Civil Liberties Union has often urged in the past that the greatest possible freedom be maintained in discussion of public issues. (See *People* v. *Edmondson*, 168 Misc. (N. Y.) 142). The extension of the law of libel, as urged by the respondent, to impose punitive damages for imputing opinions to a public official would limit the area of free speech to the impairment of the petitioner's Constitutional rights. Courts should be bound no less than legislatures and executives to respect the Constitutional guarantees of free speech and free press. In determining the proper boundary at which the courts may limit free speech and free press by the imposition of punitive damages for alleged defamatory statements, the individual interest in the integrity of one's personal reputation must be balanced against the social interest in freedom of expression. It is submitted that in so far as public officials are concerned, the policy requirements of the private interests are superseded by the public interest to discuss without fear the qualifications and opinions of elective officers.

Our position is well stated in the dissenting opinion of Mr. Justice Clark, of the Circuit Court of Appeals for the 2nd Circuit, in the case below, *Sweeney* v. *Schenectady Union Pub. Co.*, 122 F. (2d) 288 (adv. sheets), which reversed an order of the District Court dismissing the complaint for failure to state a cause of action. After a discussion of the New York cases dealing with the "public official" rule, he characterized them as holding not libelous *per se* comments on public officers even more directly suggesting corrupt motives than does the one here which charges rather bigotry and prejudice than corruption or impropriety. He went on to say:

"• • • It would be a fine world to live in if only tolerance were so usual that a charge of the lack thereof against a public official could be so presumptively untrue that it would seem on its face unfair and libelous. But in our present world we must not take the naive view that what ought to be is, and that whoever suggests the contrary is a slanderer; for if we do so, we shut off all healthy criticism of prejudice, and allow bigotry full scope to act with impunity. Even more dangerous is the rationale of the decision that a comment leading an appreciable number of readers to hate or hold in contempt the public official commented on is libelous *per se*. Its broad sweep would take in comments found day after day in the most conservative newspapers, either in direct statement or as quotations of responsible critics, that a public official, particularly a legislator, is pro- or anti-labor, or pro- or anti-Nazi, or pro or anti this or that race, color, or creed. Minority comment on labor, religious and political views and activities of politicians becomes therefore hazardous. And the making of fine distinctions in rationale is indicated by the implication that a comment suggesting plaintiff's objection to the judicial candidate for his foreign birth alone would have been proper. *Of course, the uncertain threat of suit, invited by a rule at once so vague and so extensive, is a restriction on freedom of the press almost as direct as a rule of clear liability.*" *Sweeney* v. *Schenectady Union Publishing Co.*, supra 291, 292. (Italics ours.)

It is our belief that if the punitive penalty of libel *per se* were to attach to the article complained of, there would be an unconstitutional deprivation of the right of free speech and a free press.

We respectfully submit that the order of the Circuit Court of Appeals should be reversed.

EDMUND D. CAMPBELL,
Attorney for American
Civil Liberties Union.

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Supreme Court of the United States

October Term, 1941

No. 745

THE SCHENECTADY UNION PUBLISHING COMPANY,
Petitioner,

vs.

MARTIN L. SWEENEY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE*

MILTON HANDLER
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Counsel for the American Jewish Committee, the B'nai B'rith, the Jewish Labor Committee and the American Jewish Congress, Amici Curiae.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE*

Preliminary

This brief is submitted on behalf of the American Jewish Committee, the B'nai B'rith, the Jewish Labor Committee and the American Jewish Congress as *amici curiae,* pursuant to leave granted by this Court on March 2, 1942.

These organizations, as stated in our petition for leave to file this brief, are separate entities with nation-wide membership among American citizens of Jewish faith. They were established, among other purposes, to foster and promote better relations among the various racial and religious groups in this country. For many years, they have been actively engaged in protecting minority rights, combating anti-Semitism and in upholding civil liberty. They are, therefore, vitally interested in the present liti-

gation because of its relation to and effect upon their efforts in these regards and because of its relationship to the maintenance of the fundamental freedoms guaranteed by the Constitution.

The Question Discussed

The question in this litigation which particularly concerns the *amici curiae* is whether it is consistent with the constitutional guarantees of free speech and a free press to hold that a comment suggesting that the acts of a public official have been influenced by anti-Semitism is libelous *per se.*[*]

Short Statement of Facts

The publication complained of in the present action consists of an article by Drew Pearson and Robert S. Allen appearing in their column "Washington Daily Merry-Go-Round," which was published in the "Schenectady Union Star" as well as in many other newspapers throughout the country. The article asserted that Congressman Sweeney, the respondent, opposed the appointment of Emerich Burt Freed, the United States Attorney for Cleveland, to the Federal Bench because he was "a Jew, and one not born in the United States" (R. 3).

The respondent alleges by way of innuendo that the article meant and intended "to convey that plaintiff was and is guilty of Un-American, racial prejudice against persons of Jewish origin and guilty of conduct unbecoming a public officer * * *" (R. 3-4).

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[*] We are not discussing the question whether the challenged publication may fairly be construed as imputing anti-Semitism to the respondent. This brief considers merely the correctness of the ruling below on the assumption that the publication bears the construction put upon it by the respondent.

The District Court interpreted the article as not charging the respondent with anti-Semitism (R. 15), but ruled that even if it imputed anti-Semitism or racial prejudice to him, it would not be libelous *per se* under the law of New York (R. 18-19).

The majority opinion in the Circuit Court of Appeals (122 F. (2d) 288) holds that the article, by charging respondent with racial prejudice, subjects him to hatred, contempt and ridicule and is therefore libelous *per se* (R. 27). Judge CLARK dissented on the ground that the ruling of the majority is "not in accordance with New York law" and that it constitutes "new" and "definitely disturbing law" which is unsupportable as a matter of policy (R. 31).

Argument

I

The ruling of the majority in the Court below is a novel and dangerous extension of the law of libel which trenches upon fundamental constitutional liberties. To hold that the imputation of anti-Semitism is libelous *per se* is to abridge the constitutional guarantees of freedom of speech and of the press.

Liability for libel admittedly constitutes a recognized exception to the constitutional precepts of freedom of expression. The attrition of fundamental constitutional liberties, therefore, can be avoided only by keeping the law of libel strictly within the bounds marked by logic and sound policy. Manifestly, freedom of speech and of the press could be emptied of all significance if the law of libel were to be unduly extended to embrace comments not susceptible of a libelous interpretation. The threat of punitive liability imposes a curb upon expression and comment equally as potent as restraint by governmental

censorship or by the imposition of the "tax upon knowledge" invalidated in *Grosjean* v. *American Press Co.*, 297 U. S. 233.

Judge COOLEY, in a passage quoted by this Court in *Near* v. *Minnesota*, 283 U. S. 697, 715, stated:

> " 'The liberty of the press might be rendered a mockery and a delusion, and the phrase itself a by-word, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for *harmless publications.*' 2 Cooley, Constitutional Limitations, 8th ed. p. 885."[1] (Italics ours unless otherwise indicated.)

This reasoning applies with equal force to the imposition of punitive damages in a civil action for libel.

This Court has recently adverted to the possibility of conflict between "a common law concept of the most general and undefined nature"[2] such as breach of the peace[3] or contempt of court,[4] on the one hand, and the constitutional freedoms of speech and of press, on the other. Reconciliation of the competing social interests involved can be achieved only by the recognition that these freedoms constitute "the most cherished policies of our civilization"[5] and are "vital to the maintenance of democratic institutions";[6] that they must be "guarded with a jealous

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[1] " 'The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens. 2 Cooley's Constitutional Limitations, 8th ed. p. 886.' " *Grosjean* v. *American Press Co.*, 297 U. S. 233, 249.

[2] *Cantwell* v. *Connecticut*, 310 U. S. 296, 307-308.

[3] *Cantwell* v. *Connecticut*, *supra*.

[4] *Bridges* v. *California*, — U. S. —, 86 L. ed. 149.

[5] *Bridges* v. *California*, *supra*, p. 151; *Thornhill* v. *Alabama*, 310 U. S. 88, 102.

[6] *Schneider* v. *State*, 308 U. S. 147, 161.

eye";[7] that they must be given "the broadest scope that could be countenanced in an orderly society"[8] since they are "the matrix, the indispensable condition, of nearly every other form of freedom;"[8a] that the only utterances which may be punished are those which threaten with a "degree of imminence extremly high"[9] an "extremely serious" "substantive evil";[10] that "silence coerced by law—the argument of force in its worst form"[11] is to be eschewed; that the remedy for the abuse of speech is "more speech, not enforced silence";[12] that "an indiscriminate ban on public expression that operates as an overhanging threat to free discussion"[13] cannot be tolerated; and that "it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions".[14]

In *Cantwell* v. *Connecticut*, 310 U. S. 296, where the issue was whether the common law of breach of the peace had been applied by the state court in a manner

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[7] *American Federation of Labor* v. *Swing*, 312 U. S. 321, 325.

> "No more grave and important issue can be brought to this Court than that of freedom of speech and assembly, * * *" STONE, *J.*, in *Hague* v. *C. I. O.*, 307 U. S. 496, 524. See also *Grosjean* v. *Am. Press Co.*, 297 U. S. 233, 243.
>
> "In every case, therefore, where legislative abridgement of the rights [of free speech and free press] is asserted, the courts should be astute to examine the effect of the challenged legislation." *Schneider* v. *State*, 308 U. S. 161.

[8] *Bridges* v. *California*, *supra*, p. 154.

[8a] *Palko* v. *Connecticut*, 302 U. S. 319, 327.

[9] *Bridges* v. *California*, *supra*, p. 153.

[10] *Id.*, p. 153; see also BRANDEIS, *J.*, concurring in *Whitney* v. *California*, 274 U. S. 357, 376.

[11] BRANDEIS, *J.*, concurring in *Whitney* v. *California*, 274 U. S. 357, 375-376.

[12] *Id.*, p. 377.

[13] FRANKFURTER, *J.*, dissenting in *Bridges* v. *California*, *supra*, p. 171.

[14] *Bridges* v. *California*, *supra*, p. 157.

consistent with the commands of the Federal Constitution, this Court described the nature of the process of adjudication that must be pursued in such cases, as follows:

> "Decision as to the lawfulness of the conviction demands the weighing of two conflicting interests. The fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged. The State of Connecticut has an obvious interest in the preservation and protection of peace and good order within her borders. We must determine whether the alleged protection of the State's interest, means to which end would, in the absence of limitation by the Federal Constitution, lie wholly within the State's discretion, has been pressed, in this instance, to a point where it has come into fatal collision with the overriding interest protected by the federal compact" (p. 307).

In concluding that there had been an abridgment of the constitutional freedom, the Court said:

> "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to *exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement.* But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy" (p. 310).

A similar potential conflict exists in the case of libel.

The classic definition of libel is but a "recitation of phrases that are the short-hand of a complicated historic process".[15] Applied mechanically, as was done by the

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[15] FRANKFURTER, *J.*, dissenting in *Bridges* v. *California, supra,* p. 170, in dealing with an analogous question.

court below, without recognition that the familiar terms in which such definitions are couched, such as hatred, contempt, ridicule and shame, are elusive words which have many shades of meaning and which through long usage have become words of art, the test of libel can easily be perverted into an effective instrument for the suppression of speech. The vagueness of its contours, the ambiguity of its terms, the breadth of its condemnation, and the harshness of its penalties [16] require the greatest caution in the application of this tort. The formula cannot be employed as the exclusive tool of decision without placing speech in the gravest jeopardy.

The correct application of the test, we submit, requires a delicate balancing of the interest of the public in free speech and a free press with the interest of the individual in the protection of his reputation. This entails a careful evaluation of the considerations of policy implicit in curbing expression and comment through the imposition of the punitive liability of libel *per se*.

The fact that an utterance may or does cause harm is not controlling in determining whether it is libelous *per se*. While recognizing that words may be potent instruments for the infliction of harm, the law has drawn the vital distinction between utterances which are actionable on proof of damages and utterances which are actionable *per se* without proof of damages.

The question here is not whether there should be liability for the actual injury, if any, which may be shown to result from the present publication—it is whether punitive damages may be assessed within the fluctuating dis-

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[16] "A police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive * * *" BRANDEIS, *J.*, concurring in *Whitney* v. *California*, 274 U. S. 357, 377.

cretion of a jury without regard to the actual loss sustained or the degree of harm inflicted.[17]

What considerations of policy could possibly justify the imposition of presumptive liability for the publication of the statements here complained of?

The Court will take judicial notice of the fact that anti-Semitism has unfortunately spread in this country in recent years following its use abroad as an effective instrument of dictatorship. The threat of anti-Semitism to our democratic institutions is manifest. The *amici curiae* have naturally been much concerned with the intensification of racial and religious prejudice. But the democratic way of combating this evil is by the process of education and open and free debate rather than by the suppression of anti-Semitic preachments by legislative fiat.[18]

It must be remembered that the law provides no private remedy to minority groups which are the object of scurrilous attack. In most jurisdictions, including New York,[19] such minority groups may be vilified and defamed, directly or by innuendo, by the unbridled tongues of demagogues and bigots without civil redress. To deny such groups the right of full and effective answer in the best traditions of free American debate is to deprive them of the necessary means of self-defense. The normal process of public debate and education requires the free expression of opinion and the resort to the typical shorthand expressions and polemical epithets which have long characterized American argument.

The statement that a person is an anti-Semite is essentially an expression of opinion. It describes an attitude,

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[17] Respondent did not avail himself of the opportunity afforded him by the trial court to amend his pleadings by alleging special damages.

[18] A New Jersey statute along these lines was held unconstitutional recently in a case involving members of the German-American Bund. *New Jersey* v. *Klapprott*, 127 N. J. L. 395.

[19] See, *People* v. *Edmondson*, 168 Misc. 142. *Cf. Gross* v. *Cantor*, 270 N. Y. 93.

a point of view, a set of beliefs. Whether a person espouses or is influenced by anti-Semitism in his actions is necessarily a matter of inference. An orator in the course of an address may refer disparagingly to Jews as a class or to some Jews. Are newspapers, radio stations and other vehicles of communication to be visited with the onerous consequences of punitive liability for characterizing by way of answer and refutation such utterances as anti-Semitic and their author as an anti-Semite? Are they to be compelled in multitudinous lawsuits to assume the burden of establishing that the mental operations of the person criticised justifies their expression of opinion? Will not such restraints encourage anti-Semitism?

The rule contended for by the respondent must have far reaching effects. The imposition of liability on the grounds upon which it is here sought would necessarily result in the similar imposition of liability for the expression of belief on any matter upon which public feelings at any moment run high or of views which are regarded with distaste by substantial elements of the population.

As pointed out by Judge CLARK with great clarity in his dissent below (R. 32), the same reasoning which renders the imputation of anti-Semitism actionable *per se* would render equally libelous the statement that the respondent is philo-Semitic, or that he is pro- or anti-labor, pro- or anti-Negro, or that he favors or opposes any group which has its strong adherents and adversaries. There is scarcely any issue in the field of public debate on which opinions do not strongly clash. The sharper the division in public opinion the more spirited is the debate of the opposing forces. The epithets "isolationist" and "war-monger" were, in some circles prior to Pearl Harbor, as opprobrious as the charge complained of here. In a perfect world in which truth, justice and reason always prevailed, there might be no warrant for the resort to the customary procedures of public debate, comment and criticism. Certainly in the type of world in

which we find ourselves, especially in these tragic days, any curb upon such procedures would be fraught with the greatest danger to our democratic institutions and ways of life.

Similar reasoning underlies the ruling of this Court in *Bridges* v. *California*, — U. S. —, 86 L. ed. 149, where the Court states at page 156:

> "No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression. Yet, it would follow as a practical result of the decisions below that anyone who might wish to give public expression to his views on a pending case involving no matter what problem of public interest, just at the time his audience would be most receptive, would be as effectively discouraged as if a deliberate statutory scheme of censorship had been adopted. Indeed, perhaps more so, because under a legislative specification of the particular kinds of expressions prohibited and the circumstances under which the prohibitions are to operate, the speaker or publisher might at least have an authoritative guide to the permissible scope of comment, instead of being compelled to act at the peril that judges might find in the utterance a 'reasonable tendency' to obstruct justice in a pending case."[20]

The dangers implicit in the misapplication of the libel formula were fully apprehended by James Madison, "the leader in the preparation of the First Amendment".[21] In opposing the Sedition Acts, which imposed a subsequent restraint upon "false, scandalous and malicious" writings which defamed or brought into "contempt or disrepute" or excited public "hatred" of the executive or legislative

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[20] The Court further states (p. 156): "It is therefore the controversies that command most interest that the decisions below would remove from the arena of public discussion."

[21] *Bridges* v. *California, supra,* p. 154; *Near v. Minnesota,* 283 U. S. 697, 717.

branches of the federal government, he made the following observations, quoted by this Court in its opinion in *Near* v. *Minnesota,* 283 U. S. 697, 718:

> " 'In every State, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men of every description which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this footing it yet stands * * * Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits. And can the wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; who reflect that to the same beneficent source the United States owe much of the lights which conducted them to the ranks of a free and independent nation, and which have improved their political system into a shape so auspicious to their happiness? Had "Sedition Acts", forbidding every publication that might bring the constituted agents into *contempt* or *disrepute,* or that might excite the *hatred* of the people against the authors of unjust or pernicious measures, been uniformly enforced against the press, might not the United States have been languishing at this day under the infirmities of a sickly Confederation? Might they not, possibly, be miserable colonies, groaning under a foreign yoke?' "

The underlying principle was formulated with precision and clarity as early as 1774, when the Continental Congress in a letter sent to the Inhabitants of Quebec, stated:

> " 'The last right we shall mention, regards the freedom of the press. The importance of this consists,

> besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are *shamed or intimidated*, into more honourable and just modes of conducting affairs.' ''[22]

There can thus be no doubt that the ambit of the constitutional guarantee of free speech embraces the comment now claimed to be libelous. The Constitution, of course, does not interdict all restraints, prior or subsequent, upon speech. But to classify as a libel that which inherently is non-defamatory offends against the spirit and letter of the constitutional guarantees.

The same considerations which have led this Court to hold that peaceful picketing in a labor dispute may not be restrained (*American Federation of Labor* v. *Swing*, 312 U. S. 321), or that conduct inherently lawful may not be arbitrarily denounced as a breach of the peace (*Cantwell* v. *Connecticut*, 310 U. S. 296), or that comment upon and criticism of pending litigation not obstructive of the proper administration of justice may not be punished as a contempt of court (*Bridges* v. *California*, — U. S.—, 86 L. ed. 149), prevent the extension of the vague contours of the law of libel to include utterances of the type involved in this litigation. These considerations, in any event, must tip the scale whenever the defamatory nature of the challenged publication is as doubtful as is concededly the case here. The borderline character of the utterance is noted by the majority below which states in its decision:

> "Opinions or prejudices concerning the matter in hand might well lead to different conclusions" (R. 30).

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[22] Quoted in *Near* v. *Minnesota*, 283 U. S. 697, 717, and in *Thornhill* v. *Alabama*, 310 U. S. 88, 102.

In *American Federation of Labor* v. *Swing*, 312 U. S. 321, the Supreme Court of Illinois granted an injunction restraining picketing by a labor union. One of the grounds of its decision was that the placards carried by the pickets were libelous. The placards bore the inscription: "This Beauty Shop is Unfair To Organized Labor, Hairdressers and Cosmetologists Union Local 548-D, American Federation of Labor and Chicago Federation of Labor". This Court declared the injunction which restrained "peaceful picketing" was an invasion of the constitutional guarantee of free speech. Implicit in this ruling was a prohibition against the punishment of picketing on a claim that the placards contained libelous matter. To hold otherwise would run counter to and nullify the Court's ruling.

In *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552, the Court of Appeals of the District of Columbia upheld an injunction which restrained the defendant from carrying placards bearing the following slogan: "Do Your Part! Buy Where You Can Work! No Negroes Employed Here!" On appeal this Court reversed, holding that the protective provisions of the Norris-LaGuardia Act applied to the economic dispute between the defendant Negro organization and a retail company which did not employ Negro workers in one of its stores. It would appear to be a fair inference from this decision that the Court in holding that picketing under these circumstances was permissible would not regard the language used by the defendants as libelous.

The bearing of these rulings upon the present litigation is manifest. Petitioner's article cannot be put in the same category as the historic instances of libel *per se* such as a charge of criminality. It is the improper classification and application of such offenses as breach of the peace, contempt and libel—and not the existence of the offenses themselves—which leads to the collision with the constitutional safeguards. There is no such "extremely

imminent" and "extremely serious" injury to reputation—the substantive evil to which the law of libel is addressed—caused by the challenged publication as would override the impelling policy favoring freedom of expression. As was stated in *Grosjean* v. *American Press Co.*, 297 U. S. 233, 249:

> "A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."

II

A crucial consideration in the present case is the fact that the respondent is a public officer.

One who enters the public arena by holding or seeking public office invites public approval of his acts and views. In so doing, he lays open his beliefs to public criticism and subjects his conduct to public appraisal.

To increase the effectiveness of his work, a member of Congress is clothed with an absolute privilege with respect to any utterance made on the floor of Congress. *Cochrane* v. *Couzens*, 59 App. D. C. 374, 42 F. (2d) 783. He may spread upon the Congressional Record his side of any controversy whether public or private.[23] He may use the franking privilege for the widest dissemination of his views. The same reasons of policy which result in his enjoying an absolute privilege against liability for libel require that there be the widest latitude on the part of commentators in appraising and criticizing the official's conduct and beliefs. Public officers must expect the searching inquiry of a public interested in its representatives.

> "Presidents and governors and legislators are public officials traditionally subject to political influence and the rough and tumble of the hustings, who have open

[23] The respondent followed this course in the present litigation (Congressional Record-Appendix, Nov. 25, 1941, p. A5634).

to them the traditional means of self-defense." (Mr. Justice FRANKFURTER, dissenting, in *Bridges* v. *California, supra,* p. 169.)

This is not to say that a person who enters public life exposes his reputation to unrestricted attack. It means merely that the test of libel in the case of statements concerning public officials is different from the test in the case of statements respecting private citizens. A statement uttered of a public official is defamatory only when it imputes to him gross incompetence or corruption in office. Charges of a lesser nature than gross incompetence or corruption in office, although harmful to the reputation of a public officer, are not libelous *per se.* This rule has been clearly enunciated in *Tanzer* v. *Crowley Pub. Corp.,* 240 App. Div. (N. Y.) 203, 268 N. Y. Supp. 620, where it is said (p. 205):

"One who holds public office must expect criticism. It may be captious, ill-timed and without foundation in fact, but, outside of a clear charge of corruption or gross incompetence holding one up to disgrace and contumely, there is no libel. (*Mattice* v. *Wilcox,* 147 N. Y. 624.) Even an imputation of corrupt or dishonorable motive will be justified as fair comment if it is 'an inference which a fair minded man may draw from such facts.' (Gatley Libel and Slander, 383.) • • • Newspapers have the right to print both facts and comment in relation to the manner in which public officers perform their duties, and in doing so, reasonable accuracy and fair comment is all that is required. These should be publicly commensurate with the interest in public affairs. And the policy of the law is that the public should at all times be informed of the acts of its servants and the considerations to be applied in determining whether or not the public welfare is being served in order that it may be at all times aroused and alert to its just and essential part in the administration of government."

III

The majority in the Court below, instinctively opposing anti-Semitism which it properly deemed undemocratic and contrary to the best traditions of our American way of life, held that a charge of anti-Semitism, under the law of New York, would subject the plaintiff to hatred, contempt and ridicule on the part of a substantial portion of the population of the city of Schenectady where the article was published.

While we naturally agree with the majority's condemnation of anti-Semitism, we respectfully submit that the court failed to take cognizance of relevant legal and practical considerations. These considerations are developed with force by Judge CLARK in his dissenting opinion.

We do not suggest that it is not a serious matter to charge a person with anti-Semitism. Nor do we contend that there might not be liability for actual damage which may be shown to result from such charge.[24] Our position is that there is no warrant in the law of libel for holding such an imputation to be libelous *per se*, and it is our submission that the Federal Constitution requires that no such liability be imposed.

IV

We do not regard it as any answer to the views here elaborated that the defense of truth is available to the commentator in any suit brought against him. The memorable words of James Madison are directly pertinent:

> "In answer to such questions, it has been pleaded that the writings and publications forbidden by the act, are those only which are false and malicious, and intended to defame; and merit is claimed for the privilege allowed to authors to justify, by proving

[24] See the opinion of the trial court (R. 14) and the dissenting opinion in the Circuit Court below (R. 31).

the truth of their publications, and for the limitations to which the sentence of fine and imprisonment is subjected.

* * *

"But, whatever may have been the meritorious intentions of all or any who contributed to the Sedition Act; a very few reflections will prove, that its baneful tendency is little diminished by the privilege of giving in evidence the truth of the matter contained in political writings.

"In the first place, where simple and naked facts alone are in question, there is sufficient difficulty in some cases, and sufficient trouble and vexation in all, of meeting a prosecution from the government, with the full and formal proof, necessary in a Court of law.

"But, in the next place, it must be obvious to the plainest mind, that opinions, and inferences, and conjectural observations, are not only in many cases inseparable from the facts, but may often be more the objects of the prosecution than the facts themselves; or may even be altogether abstracted from particular facts; and that opinions and inferences, and conjectural observations, cannot be subjects of that kind of proof which appertains to facts, before a Court of law." [25]

Judge CLARK deals with the efficacy of the defense of truth in his dissenting opinion as follows (R. 33):

"I do not think it an adequate answer to such a threat against public comment, which seems to me necessary if democratic processes are to function, to say that it applies only to false statements. For this is comment and inference, as the *Tanzer* case suggests, and hence not a matter of explicit proof or disproof. The public official will always regard himself as not bigoted, and will so testify, sincerely enough. And then the burden of proving the truth of the defense

[25] Resolutions of Virginia and Kentucky, Penned by Madison and Jefferson in Relation to the Alien and Sedition Laws and Debates in the House of Delegates of Virginia, pp. 57-58.

will rest upon the commentator, who must sustain the burden of showing his inference true. If he fails in even a minority of the suits against him—as the sporting element in trials to juries susceptible to varying shades of local opinion would make probable—he is taught his lesson, and a serious brake upon free discussion established. But the common-law requirement of proof of special damages gives him the protection he needs, while at the same time it does prevent him from causing really serious injury and loss by false and unfair statements. That should be the rule applied here, as the district court held."

V

We have refrained from discussing the problems incident to the application of the doctrine of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, to the present case, which will no doubt be fully discussed in the briefs of the parties. It is our belief that the challenged publication does not offend the law of libel as developed by the courts of New York and that the law of New York was incorrectly applied below. But even if the present utterance is construed as libelous *per se* by the law of New York, such a rule of decision would, we submit, necessarily be in conflict with the Federal Constitution and require the corrective action of this Court.

WHEREFORE, the *amici curiae* respectfully urge this Court to reverse the judgment of the Circuit Court of Appeals and to reinstate the judgment of the District Court.

MILTON HANDLER
HENRY H. NORDLINGER
Counsel for the American Jewish Committee, the B'nai B'rith, the Jewish Labor Committee and the American Jewish Congress, Amici Curiae.

DAVID SHER
Of Counsel

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CHARLES ELMORE CROPL

Supreme Court of the United States

October Term, 1941

No. 745

THE SCHENECTADY UNION PUBLISHING COMPANY,

Petitioner

against

MARTIN L. SWEENEY

Motion of New York State Publishers Association for Leave to File Brief as *Amicus Curiae*

CHARLES J. TOBIN
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100 State Street,
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Of Counsel:
ELLIS J. STALEY

Supreme Court of the United States

October Term, 1941

No. 745

THE SCHENECTADY UNION PUBLISHING COMPANY,
Petitioner,

against

MARTIN L. SWEENEY.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

May it please the Court:

The undersigned respectfully moves this Court for permission to file in this cause a brief as *Amicus Curiae* in behalf of the New York State Publishers Association.

1. On December 22nd, 1941, this Court granted a writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit in the above case (122 Fed. [2nd] 288, R. 27).

2. The controlling question in this case is whether the alleged publication in reference to a member of the United States House of Representatives is libelous *per se* under the Law of New York State. The United States District Court for the Northern District of New York dismissed the complaint on the ground that it did not state a cause of action

libelous *per se* and that decision has been reversed by a divided court of the United States Circuit Court of Appeals for the Second Circuit and the petitioner in this cause has brought the case to this Court on writ of certiorari for review.

3. The New York State Publishers Association, on whose behalf this motion is filed, is an organization of the State of New York whose membership is composed of practically all of the newspapers published in the State of New York and its member-publishers are therefore vitally interested in the present litigation, which concerns the issue on the law of libel involved here and of its relationship to the maintenance of the fundamental freedom of the press guaranteed by the Constitution.

4. In accordance with the provisions of Rule 27, Subdivision 9, your petitioner has obtained the consent of the Schenectady Union Publishing Company to submit a brief *Amicus Curiae*. The consent of counsel for the Respondent Martin L. Sweeney for leave to submit such a brief *Amicus Curiae* on behalf of said Association has been requested by the counsel for said Association and been refused.

5. Although consent of one of the parties to the litigation has not been obtained and has been refused by that party, it is respectfully submitted that the present action involves questions of tantamount importance to the members of your petitioner and to the general public in the State of New York and affords an appropriate occasion for the exercise of this Court's discretion to permit the filing of a brief *Amicus Curiae* on behalf of the New York State Publishers Association.

6. A decision in this case affirming the present decision of the United States Circuit Court of Appeals will vitally affect the interest of newspaper publishers and the freedom of the press in the State of New York, and will change a rule of principle in reference to privileged comment by the New York State Press to an extent that will limit and shackle the

force of the press as an instrument of public welfare and will encroach upon the constitutional freedom of the press.

7. The petitioning Association is advised and verily believes that the decision of the Circuit Court of Appeals for the Second Circuit is not in accord with the New York State Rule in relation to the extent of privileged comment in relation to public officers and public officials and that the issue upon this appeal goes to the essence of freedom of the press under the democratic traditions of our country and under the Law of the State of New York.

8. The petitioning Association is advised that the decision of the Court below in effect represents an unprecedented extension of liability for the publication of comment on public officers and public affairs contrary to the foundamental rights of the press. Your petitioner believes that the issues involved are of such far-reaching importance that it is justified to petition this Court for the privilege of presenting its views in connection with their determinaton.

WHEREFORE, it is respectfully prayed that this Court grant leave to your petitioner to file a brief *Amicus Curiae,* such brief to be filed not later than March 23, 1942, or such other time as the Court may deem proper.

CHARLES J. TOBIN,
Counsel for New York State Publishers Association.

ELLIS J. STALEY,
Of Counsel.

Consent to the filing of brief as *Amicus Curiae* by New York State Publishers Association and entry of order thereon is hereby granted.

MORRIS L. ERNST,
WILLIAM A. ROBERTS,
Solicitors for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 745.

THE SCHENECTADY UNION PUBLISHING COMPANY,
Petitioner,
against
MARTIN L. SWEENEY.

BRIEF FOR NEW YORK STATE PUBLISHERS ASSOCIATION AS *AMICUS CURIAE*.

The New York State Publishers Association is concerned with this case because the rule of privileged comment as stated in the majority opinion of the Circuit Court of Appeals in this case (R. 27-33; 122 Fed. 2nd 288), alters the New York rule as heretofore understood by New York State Publishers and such change we assert is an intrusion on the freedom of the press.

The publication here charged as libel *per se* is not such when measured by the previous standards established by the New York Courts and the new rule applied by the Circuit Court here violates the constitutional guarantee of freedom of the press (U. S. Constitution, Amendment 1), and the provisions of Article I, Subdivision 8 of the New York State Constitution.

Statement of the Case.

The petitioner seeks on writ of certiorari to this Court to review a judgment of the Second Circuit Court of Appeals (R. 36) which reversed a judgment of the District

Court for the Northern District of New York, which judgment dismissed a complaint for libel on the ground that it failed to state a cause of action for libel *per se* against the petitioner (R. 23-24). The publication alleged to be libelous was published on December 23rd, 1938, in the newspaper "The Schenectady Union Star," published by the petitioner in the City of Schenectady, New York, as a part of a column under the title "Washington Daily Merry-Go-Round" and read as follows (R. 3):

> "A hot behind-the-scenes fight is raging in Democratic congressional ranks over the effort of Father Coughlin to prevent the appointment of a Jewish judge in Cleveland.
>
> "The proposed appointee is Emerich Burt Freed, U. S. District Attorney in Cleveland and former law partner of Senator Bulkley, who is on the verge of being elevated to the U. S. District Court.
>
> "This has aroused the violent opposition of Representative Martin L. Sweeney, Democrat of Cleveland, known as the chief congressional spokesman of Father Coughlin.
>
> "Basis of the Sweeney-Coughlin opposition is the fact that Freed is a Jew, and one not born in the United States. Born in Hungary in 1897, Freed was brought to the United States at the age of 13, was naturalized 10 years later.
>
> "Irate, Representative Sweeney is endeavoring to call a caucus of Ohio Representatives December 28 to protest against Freed's appointment."

The pertinent question here is whether such publication is in, and of, itself a libelous publication under the law of New York State and more particularly, whether the assertion that a Representative in Congress opposed a Federal appointment because the proposed candidate was a Jew and foreign born is a statement libelous *per se.*

The libel in the case at bar was published in New York State and therefore under the ruling of the Supreme Court of the United States in *Erie Railroad vs. Tompkins,*

304 U. S. 64, and under the Rules of Decisions Act, 28 U. S. C. 725, the law of New York in regard to libel must alone control.

POINT I.

The New York rule permits privileged comment on the acts of public officials or matters of public concern.

The democratic process requires that a broad latitude be given to the discussion and criticism of the acts of public officials. The general rule of privileged comment both in Federal and New York State jurisdictions is that the doctrine of privilege and the law of libel permits the honest censorship by the newspaper press over the conduct of officials in the management and control of public affairs.

Gandia vs. Pettingill, 222 U. S. 452, 32 S. Ct. 127.
Ashford vs. Evening Star Newspaper Co., 41 App. D. C. 395.
Hoeppner vs. Dunkirk Printing Co., 254 N. Y. 95.
Bingham vs. Gaynor, 203 N. Y. 27.
Hills vs. Press Co., 122 Misc. 212, affd. 214 A. D. 752.
Hamilton vs. Eno, 81 N. Y. 116.

In the *Gandia* case, Justice Holmes in his opinion for the Court enunciated the following rule:

> "So far as the facts were concerned, the publication of them alone was not libelous. For apart from the question whether attributing to the plaintiff conduct that was lawful as the plaintiff says, could be a libel, he was a public officer in whose course of action connected with his office the citizens of Porto Rico had a serious interest, and anything bearing on such action was a legitimate subject

> of statement and comment. It was so at least in the absence of express malice."

The New York rule also stated in *Hamilton vs. Eno*, 81 N. Y. 116, decided by the Court of Appeals in 1808 (p. 127):

> "We are of the opinion that the official act of a public functionary may be freely criticised, and entire freedom of expression used in argument, sarcasm and ridicule upon the act itself."

This rule has been followed in New York and repeated again and again and was stated by Justice Crane in the case of *Hoeppner vs. Dunkirk Printing Company*, 254 N. Y. 95, at page 99:

> "Everyone has a right to comment on matters of public interest and concern provided he does so fairly and with an honest purpose. Such comments or criticisms are not libelous, however severe in their terms unless they are written maliciously."

And in *Hills vs. Press Company*, 122 Misc. 212, affirmed 214 App. Div. 752, the Court stated at page 215:

> "The acceptance of public office in effect confers the privilege to criticize one's acts because of the public interest in official administration. Criticism which is untrue may be unjust but no one can reasonably give to it an effect greater than the law puts upon it and greater than fair public opinion would ascribe to it."

The daily newspaper occupies a unique position in the daily life of every citizen in that it provides a medium of transferring news events of current interest to the doorstep of its readers and also through its function of critic and censor characterizes such events either as favorable to, or detrimental to, the public welfare as a whole. To insure a democratic government and to protect the civil liberties of the citizens of our country the press must be

protected in its right to comment and criticize or else its function as an instrument of public service will be destroyed.

The most recent judicial expression on the right to comment and criticize a public official by the press was made in the decision of the case of *Hall vs. Binghamton Press Company* in the Appellate Division, Third Department of the New York State Supreme Court rendered on the 4th day of March, 1942. Justice Bliss in his concurring opinion, holding that the complaint in that action did not state a cause of action libelous *per se* makes the following statement in his opinion:

> "Ours is a representative government and one who assumes to represent our citizens in a legislative hall must expect that his acts will be commented upon and criticised. When the safety of the nation is at stake strong men do not mince matters and neither the citizen nor his representative can be squeamish about it. Freedom of speech and press are guaranteed to us in our form of government and it is the right of the free press to criticise severely and of a free citizenry to speak plainly to and of its representatives. If they believe that the acts of such representatives are opposed to the national interest it is not only their privilege but their duty to say so."

The New York Courts have thus recognized the function and the duty of the press to present comment and criticism of the public acts of public officials as part of its service to promote the public interest. It has been the rule established by the Courts of New York that the limits to be placed upon the right of privileged comment by the press should be confined to publications reasonably considered as fair comment and criticism.

Briarcliff L. Hotel vs. Citizen Sentinel Publishers, Inc., 260 N. Y. 106.

Tanzer vs. Crowley Publishing Corp., 240 A. D. 203.
Foley vs. Press Publishing Co., 226 A. D. 535.
Hills vs. Press Company, 122 Misc. 212, affd. 214 A. D. 752.

The New York definition of fair comment applicable to publications referring to public officers appears from the opinion of Judge Crane in the *Briarcliff* case to be as follows:

> "A comment is fair when it is based on facts truly stated and free from imputations of corruption or dishonest motives on the part of the person whose conduct is criticized and is an honest expression of the writer's real opinion or belief. Mere exaggeration, slight irony or wit or all those delightful touches of style which go to make an article readable do not push beyond the limitations of fair comment."

In the case of *Tanzer vs. Crowley Publishing Corp.*, 240 A. D. 203, the defendant published an attack upon a former mayor of Little Falls, New York, charging that the plaintiff while mayor, had appointed a certain person as city attorney to protect a client of the appointee. The Appellate Division dismissed the complaint, stating at page 204:

> "In our view, the language used in the article is not libelous but at most consists of comment and criticism of a public official which falls within the limit of the privilege of a newspaper to print and carry in the public interest and welfare * * * one who holds a public office must expect criticism. It may be captious, ill timed and without foundation and fact but outside of a clear charge of corruption or gross incompetence holding one up to disgrace and contumely there is no libel."

In the case of *Hills vs. Press Company, supra*, the plaintiff suing the defendant for libel, charged that the

defendant had printed articles charging the plaintiff with favoritism in his office as a county fuel administrator, and with unfairness and inactivity in his work and the enforcement of orders. The Court, holding that the publication was not libelous *per se*, stated:

> "To summarize, it may be stated that it is held as matter of law that the publications are not libelous *per se* in that they do not impute the commission of a crime, or tend to bring the plaintiff into ridicule and contempt, or disparage him in his office or tend to show him unworthy of a public trust."

The long line of authorities on the subject of fair comment established by the Courts of New York State follow the foregoing limitations on the right of newspapers to comment and such limitations have become the accepted standards by which publishers measure the privilege extended to them for censorship of the acts of public officials. Public opinion of course places a definite limitation upon the propriety of comment and the publishers recognize that boundaries must be established somewhere. However, having accepted the judicial limitations as heretofore set forth as the proper boundary line for fair comment, the New York State Publishers Association strongly urges that such limitation should not be restricted to a further degree and any such restriction as that imposed by the present opinion in the Circuit Court of Appeals in this case becomes rather an intrusion beyond the guarantees of free exercise of comment and freedom of the press, as provided for by the Federal and New York State Constitutions.

POINT II.

The alleged publication herein is not libelous *per se* under the controlling law of New York State.

The publication which has been alleged to be libelous *per se* was to the effect that Congressman Sweeney opposed the appointment of one Freed to the position of United States District Judge because he was "a Jew and foreign born." The appointment of any individual to a position in the Federal Government is a matter of public concern and interest and certainly the act of an elected official in either promoting or opposing such an appointment is an event which the public has a right to be informed of and a matter that is entitled to criticism and comment by individual and press alike.

The question of whether there was opposition to the appointment of Mr. Freed was certainly of importance to the citizens of the country who depend upon the courts for impartial justice and who deserve to have the highest caliber of citizen promoted to those positions. The public has an inherent right to be informed of the favorable and unfavorable attributes of those proposed for Federal positions. Thus, the fact that there was any opposition at all to Freed's appointment was of value to the interested public and the further fact that a public officer was using the influence of the office bestowed upon him by public consent to oppose the appointment of a Federal judge was not only a subject for comment but it was an obligation of the press to so comment.

Petitioner's publication was made in the line of duty and as a part of its performance for the public interest to promote the public welfare.

The comment on the acts of Congressman Sweeney alleged to be libelous *per se* in this action was not a criticism resulting in a charge of corruption or gross incompetence, holding him up to disgrace and contumely. It was a criticism of the poor judgment of the basis for his opposition to Freed's appointment. The publication does not charge a crime, nor tend to bring him into ridicule and contempt or disparage him in his office or tend to show him unworthy of a public trust. The fact that many will disagree with the grounds of his opposition does not transform the publication into libel any more than if the publication had stated that he opposed Freed because he was a Republican or a New Dealer. The elements necessary to make the publication transgress the boundaries of fair comment as established by the New York Courts are lacking here and the publication is therefore not a publication libelous *per se*.

In the very recent case of *Hall vs. Binghamton Press Company* the question of the law of libel in relation to the acts of a public official was involved. The defendant was charged with publishing editorials referring to Congressman Hall, the Representative of the Thirty-fourth Congressional District of New York State, and criticizing him for casting his vote against the Lend-Lease Bill. Among the many statements made in the editorial, the following is a typical example of the comment charged with libel:

> "It seems in order, to ask you at this juncture whether you do feel that this country should be defended against unAmericanism or whether you are going to take the line of least resistance and wind up with the Quislings."

The editorials, in spite of the personal references, were held by the Appellate Division, Third Department of the New York State Supreme Court, not libelous *per se* and

the complaint in that action was dismissed by decision in the Court rendered on March 4, 1942.

In the opinion of the Court, Presiding Justice Hill stated:

> "In times like those through which we have recently passed, the doctrine of fair comment should be extended as far as the authorities will permit. With unprecedented social and governmental conditions, our own institutions threatened, national legislators who participated in the formation of governmental policies should be held to the strictest official accountability. History has shown that this is promoted through free exercise of the right to criticize official acts. The people furnish the legislators with an extensive and expensive secretariat, give them the right to use the mails at public expense. Their colleagues are generous in granting leave to print. With these opportunities for personal praise and propaganda, opposition newspapers and editorial writers should not be limited to weak, tepid and supine criticism and discussion.
> • • •
>
> "Criticism as to matters of public interest and concern is privileged so long as the criticism is fair with an honest purpose and not intemperate and malicious. The protecting privilege is not lost because the discussion brings embarrassment to the official."

and Justice Bliss in his concurring opinion states:

> "If the press or our citizens honestly believe that the acts of a legislative representative lend comfort to our nation's enemies there must be no question about the right to tell him just that in no uncertain terms. Queasy words will not do. How else can a democracy function? If the citizens believe such acts may be setting up a government of Quislings, they must have the right to say so. It is one of the verities of democracy that eternal vigilance is the price of liberty. The courts may not muzzle those

who maintain such vigilance. Great issues require strong language. If a legislator's vote cannot be criticized as being opposed to the national interest, then there is no field of fair comment.

"In this light the editorials were but fair comment and criticism of a public official. The editorials themselves are wholly free from any imputation of corrupt or dishonorable motives and none of them accuse the plaintiff of being personally corrupt or dishonest."

The New York State Publishers Association respectfully urges that the rule applied by the Appellate Division in this most recent case represents the applicable rule as enunciated by New York Courts and as understood by New York publishers in relation to comment on the acts and words of public officers.

The evil of narrow-minded bigotry and oppressive intolerance condemned by the opinion of Judge Chase in the Circuit Court is in fact fostered and nourished by the very rule there established by the Court. It is true that the practices of "that one foreign dictator, which included large-scale unreasonable persecution," have received violent disapproval in our country where liberty and freedom of thought and action still prevail.

Yet, the success of those Hitlerite practices can be traced and accredited to the fact that press censorship was dormant and totally absent in the country where such wholesale intolerance was permitted to get a strong foothold, to the extent that absolute dictatorship was built on the theory of extensive oppression of a minority.

The danger to be anticipated and guarded against is that under the protection of the rule of the Circuit Court in this case the force of the press to exercise its proper function of critic and censor of any acts tending to sow the seeds of intolerance, sedition and treason would be shackled and rendered useless. As Justice Clark sug-

gested in his minority opinion if we adopt the rule as presented by the majority opinion in the Circuit Court "we shut off all healthy criticism of prejudice and allow bigotry full scope to act with impunity."

The New York State Publishers Association vigorously urges that in these times the protection of the freedom of the press is imperative to insure a future world in which the principles of democracy will be recognized and practiced. This is not the time to change an age-worn rule of law and substitute in its place a new definitely disturbing rule of law.

In *Howarth vs. Barlow,* 113 App. Div. 510, the Appellate Division setting aside a libel verdict for plaintiff, says (p. 514):

> "The people are not obliged to speak of the conduct of their officials in whispers or with bated breath in a free government but only in a despotism. On the contrary, they have a right to speak out in open discussion and criticism thereof, the only test being that they make no false statement; and this is the great safeguard of free government and of pure government. This is fundamental among us."

Recently commenting on the surrender which the English people have had to make of their traditional liberties, Geoffrey Crowther, the editor of the London Economist, offers us this advice:

> "If I were an American, I should not be frightened by the concentration of powers, even arbitrary powers, in one pair of hands. On the contrary, I should be alarmed by any failure to concentrate powers since the effectiveness of the whole national effort may depend upon decisions being taken with speed and resolution. But I should watch with an eagle eye any attempt to abate criticism, stifle the expression of opinion—any opinions short of sedition."

It is this precious right—the right of criticism and fair comment—that is before this Court for decision.

The New York State Publishers Association respectfully commends that the decision of the Circuit Court of Appeals be reversed and that the New York State rule be applied and reaffirmed.

POINT III.

The judgment of the Circuit Court of Appeals should be reversed and the judgment of the District Court reinstated.

Respectfully submitted,

CHARLES J. TOBIN,
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100 State Street,
Albany, N. Y.

Of Counsel:
ELLIS J. STALEY.

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Supreme Court of the United States

October Term, 1941

No. 745

THE SCHENECTADY UNION PUBLISHING COMPANY,
Petitioner,

against

MARTIN L. SWEENEY

Motion of the American Jewish Committee, the B'nai Brith, the Jewish Labor Committee and the American Jewish Congress for Leave to File Brief as *Amici Curiae*

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Supreme Court of the United States

October Term, 1941

No. 745

THE SCHENECTADY UNION PUBLISHING COMPANY,
Petitioner,

against

MARTIN L. SWEENEY

MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF *AMICI CURIAE*

May it please the Court:

The undersigned, as counsel for the American Jewish Committee, the B'nai Brith, the Jewish Labor Committee and the American Jewish Congress, respectfully moves this Honorable Court for leave to file a brief in this cause on behalf of said organizations, *amici curiae*:

1. This is a petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review a decision of that court rendered by a divided bench (122 F. 2d 288; R. 33-39). The petition was filed herein on November 15, 1941 and in usual course respondent's brief will be filed on December 5, 1941.

2. The organizations above named have requested the consent of both parties to the submission of a brief *amici*. Consent has been granted by counsel for peti-

tioner. At the time of writing, counsel for respondent has failed to indicate whether he intends to grant or refuse consent. As this Court will adjourn after today's session until December 8, 1941, which will be subsequent to the distribution of the petition and responding brief to members of the Court, we are obliged to present this motion today without waiting for further response from counsel for respondent.

3. Although consent of one of the parties to the litigation has not been obtained as provided in Rule 27, subd. 9, of the Rules of this Court, it is respectfully submitted that the present case affords appropriate occasion for the exercise of this Court's discretion and undoubted power to receive the brief *amici*.

4. These organizations are separate entities with nation-wide membership among Jewish people. They are earnestly engaged in the maintenance of the fundamental freedoms guaranteed by the constitution and the protection of minority rights.

5. A divided court below held that charging a public official with anti-Semitism is libelous *per se*. The practical effect of the decision would mean that an utterance which identifies a public official with an unpopular view on a matter of public concern, or which suggests that such unpopular view has influenced action taken by him as a public official, involves presumptive and punitive liability. Such a decision affects a marked restriction upon the ambit of free discourse respecting the activities and opinions of public officials. In this aspect it raises a question going into the essence of the notion of free speech and freedom of the press in a democracy. It also has a peculiar significance in its relation to the expression of opinion by minority groups in the community. For it renders hazardous criticism by the members of such groups and by

the press charging public officials with bias against minorities. The imposition of presumptive liability exercises a realistic restraint upon such utterances. False accusations, of course, should render the publisher liable for actual damages.

6. It is the considered view of the organizations proposing to submit the brief *amici* that this decision represents a novel and unprecedented extension of the frontiers of the law of libel and raises questions of transcendent public importance warranting review by this Court. While the parties to the litigation may be expected adequately to present the particular considerations which in their respective opinions should govern the case, we feel that the issues involved are of such far-reaching importance that the views of organizations whose day-to-day activities touch realistically upon these issues, and which have given years of study to them, will be of assistance to the Court.

Wherefore counsel respectfully urges that this Court grant leave to file a brief on behalf of the *amici curiae*, such brief to be filed not later than December 5, 1941.

LOUIS OTTENBERG,
Counsel for the American Jewish Committee, the B'nai Brith, the Jewish Labor Committee and the American Jewish Congress, amici curiae.

FILED
FEB 16 1942
CHARLES ELMORE CROPLEY
CLERK

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THE SCHENECTADY UNION PUBLISHING COMPANY

Petitioner

against

MARTIN L. SWEENEY

Motion of the American Jewish Committee, the B'nai B'rith, the Jewish Labor Committee and the American Jewish Congress for Leave to File Brief as *Amici Curiae*

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Supreme Court of the United States

October Term, 1941

No. 745

THE SCHENECTADY UNION PUBLISHING COMPANY,
Petitioner,

vs.

MARTIN L. SWEENEY.

MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF *AMICI CURIAE*

May it please the Court:

The undersigned, as counsel for the American Jewish Committee, the B'nai Brith, the Jewish Labor Committee and the American Jewish Congress, respectfully moves this Honorable Court for leave to file in their behalf a brief *amici curiae* in this cause.

1. On December 22, 1941, this Court granted a writ of certiorari (..... U. S. ....., 86 L. Ed. 315) to review the decision of the Circuit Court of Appeals for the Second Circuit in the above entitled case (122 F. [2d] 288; R. 27).

2. In accordance with the provisions of Rule 27, subdivision 9, your petitioners have obtained the consent of the Schenectady Union Publishing Company, Petitioner herein, to the submission of a brief *amici curiae.* The consent of counsel for the respondent Sweeney has not been

sought inasmuch as he denied a prior request of your petitioners for his consent to their filing a brief *amici curiae* on the petition for a writ of certiorari in this case. His letter of refusal was read into the Congressional Record by the respondent (Congressional Record—Appendix, November 25, 1941, A5635). Under these circumstances, it appeared useless to make any further effort to obtain the consent of respondent to the filing of a brief *amici curiae* in respect of the hearing of the present writ.

3. On November 24, 1941, your petitioners moved this Court to submit a brief *amici curiae* with respect to the petition for certiorari which was then being sought. That motion was made shortly before the Court went into recess at a time when respondent had failed to indicate whether he would grant or withhold his consent. At the hearing of the motion, this Court stated that permission to file a brief *amici curiae* would be granted if the consent of the respondent were obtained. Subsequently, as indicated above, such consent was denied and therefore, no such brief could be filed.

4. Although consent of one of the parties to the litigation has not been obtained as provided in Rule 27, subd. 9, of the Rules of this Court, it is respectfully submitted that the present case affords appropriate occasion for the exercise of this Court's discretion and undoubted power to receive the brief *amici*.

5. The organizations seeking leave to file this brief are separate entities with nation-wide membership among American citizens of the Jewish faith. They were established, among other purposes, to foster and promote better relations among the various racial and religious groups in this country. For many years, they have been actively engaged in protecting minority rights, combating anti-Semitism and in upholding civil liberty. They are, therefore, vitally interested in the present litigation because of

its relation to and effect upon their efforts in these regards and because of its relationship to the maintenance of the fundamental freedoms guaranteed by the Constitution.

6. A divided court below held that charging a public official with anti-Semitism or suggesting that such official has been influenced in his acts by anti-Semitism, is libelous *per se*. Your petitioners are necessarily concerned with this ruling, the practical effect of which is that an utterance which identifies a public official with an unpopular view on a matter of public concern, or which suggests that such unpopular view has influenced action taken by him as a public official, involves presumptive and punitive liability. The grounds upon which the decision rests are equally applicable to any expression of views which are regarded with distaste by substantial elements of the population in respect of which public feelings at the moment run high. Such a decision effects a marked restriction upon the ambit of free discourse respecting the activities and opinions of public officials. In this aspect it raises a question going into the essence of the notion of free speech and freedom of the press in a democracy. It also has a peculiar significance in its relation to the expression of opinion by minority groups in the community. For it renders hazardous criticism by the members of such groups and by the press charging public officials with bias against minorities.

7. It is the considered view of the organizations proposing to submit the brief *amici* that this decision represents a novel and unprecedented extension of the frontiers of the law of libel which trenches upon fundamental constitutional liberties. While the parties to the litigation may be expected adequately to present the considerations affecting their individual interests, we believe that the issues involved are of such far-reaching importance that the views of organizations whose day-to-day activities

touch realistically upon these issues, and which have given years of study to them, may be of assistance to the Court.

Wherefore, it is respectfully urged that this Court grant leave to your petitioners to file a brief *amici curiae*, such brief to be filed not later that February 25, 1942 or such other time as the Court may deem proper.

HENRY H. NORDLINGER,
Counsel for the American Jewish Committee, the B'nai B'rith, the Jewish Labor Committee and the American Jewish Congress, amici curiae.

MILTON HANDLER,
Of Counsel.

FILED
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Supreme Court of the United States

October Term, 1941

No. 745

THE SCHENECTADY UNION PUBLISHING COMPANY

Petitioner

vs.

MARTIN L. SWEENEY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Petition by The Schenectady Union Publishing Company for Rehearing and for Stay of Issuance of Mandate

MORRIS L. ERNST
WILLIAM A. ROBERTS
Solicitors for Petitioner

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Supreme Court of the United States

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THE SCHENECTADY UNION PUBLISHING COMPANY,
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Petition by The Schenectady Union Publishing Company for Rehearing and for Stay of Issuance of Mandate

Comes now the petitioner, the Schenectady Union Publishing Company, by Morris L. Ernst, its solicitor, and respectfully prays for a rehearing of this case and for a stay of issuance of the mandate of this Court. The judgment of this Court, handed down on April 13, 1942, reads as follows:

> "The judgment is affirmed by an equally divided court. Mr. Justice Jackson took no part in the consideration or decision of this case."

The Problem of the Evenly Divided Court

There can be no more unfortunate outcome to a litigation than the failure of the highest court of the land

to reach a decision by reason of the equal division of the Justices. Since the days of John Marshall [1] this Court has made every effort to avoid the failure of justice which a tie vote of the highest tribunal of the land portends.

In line with this salutary policy, this Court has not infrequently in cases of tie votes granted rehearing, restored the case to the docket, and postponed reargument for considerable periods of time until the bench was so constituted that a majority vote could be reasonably expected.[2] The administrative problem of the tie vote has, however, been increasing. During the past 40 years there were only 35 cases of even division and 21 of these occurred during the last decade. Rehearings were sought in 16 and granted in 10.[3] A detailed analysis as to the remaining six, as far as we have been able to study the implications of the denials, indicate special circumstances calling for the refusals to rehear.

This increase in tie votes is apparently the result of voluntary disqualifications, *i. e.*, disqualifications not prem-

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[1] See *Mayor v. Miln*, 8 Peters 120, 122, where Chief Justice MARSHALL said: "The practice of this Court is not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved, unless 4 judges concur in opinion, thus making the decision that of a majority of the whole court. In the present cases 4 judges do not concur in opinion as to the constitutional questions which have been argued. The Court therefore direct these cases to be argued at the next term, under the expectation that a larger number of the judges may then be present." See also same case, 9 Peters 85.

[2] See *e. g., Home Insurance Company* v. *New York*, 119 U. S. 129, 148, 122 U. S. 636, 134 U. S. 594, originally decided at the October term, 1886 and not finally reargued until May 18-19, 1890; *The Selma Rome & Dalton R. R. Co.* v. *U. S.*, 122 U. S. 636, 637, 139 U. S. 560 (petition granted March 28, 1887, reargument had on March 25-26, 1891); *U. S.* v. *Sischo*, 260 U. S. 699, 262 U. S. 165 (rehearing granted November 23, 1922, reargument had April 23, 1923).

[3] See Appendix A. These figures are exclusive of four cases decided very recently at this term of Court.

ised on any ground mentioned in Federal statute,[4] which have become more frequent because of the growing practice of appointment to the bench of active members of the Executive and Legislative departments. We assume that the disqualification of Justice JACKSON in the instant case was of this character.

Such a disqualification does not reflect a Justice's feeling that he will be unable to judge fairly. Fully conscious of his relation to the parties or the subject matter, whatever it may be, he can guard against favorable bias as well as against leaning over backwards. The real risk of prejudicial treatment inheres only in those cases where a judge does not recognize that his opinion is affected by matters aliunde, as where the subject matter of a case touches off something in his conscious or subconscious experience. Voluntary disqualification usually stems from a judge's apprehension that his participation will subject his *court* to adverse criticism. The administration of justice is not scarred by such a disqualification in the ordinary case. But where personal preference premised on an apprehension of unfavorable public reaction results as it does here in leaving indefinitely undecided important societal and common law issues, a new factor has entered the situation which may well tip the scales the other way.

It is respectfully urged that where a tie vote results from a voluntary disqualification, the wise administration of justice requires that before confessing itself unable to decide a case rightfully before it, especially one voluntarily taken on for decision by reason of its great importance, this Court request the self-disqualifying justice to sit. The making of such a request by the Court will dispel all doubt in the public mind and in acceding to it, the justice will not be subject to personal criticism on the ground of taste. Such a procedure can entail no evil

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[4] See *e. g.*, 28 U. S. C. A. §§ 24, 25, 216.

social consequences; at the same time it will where invoked avert the failure of judicial administration evidenced by a tie vote.[5] Moreover, such a course would accord with the basic rule of necessity recognized in Anglo-American jurisprudence which requires even a legally disqualified judge to sit if otherwise there will be a failure of justice.[6]

National Implications of the Instant Case

By granting certiorari this Court has recognized that there are "special and important reasons"[7] why it should resolve the issues presented by the instant case. An even division is particularly unfortunate in this particular case in view of the multiplicity of actions still pending and the controlling importance of New York law in the field of words. New York, for better or worse, is the fountain head of national information, opinion and culture.

It should be remembered that this case is but one of many brought by respondent against different newspapers on the basis of substantially the same publication. Respondent has commenced no less than 66 separate suits,

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[5] Legislative approaches to this problem have been explored in the past. Consideration has been given to the possibility of asking retired Supreme Court Justices to sit, but the Congressional history of the presently effective Retirement Act renders the propriety of such a course doubtful under existing law. See the debates on H.R. 2518—to provide for retirement of Justices of the Supreme Court, 70th Congress, 1st Session, 81st Congressional Record, Vol. 1, at page 1114. It has also been suggested in the past that a statute be passed providing that judges of other federal courts, the presiding judges of the Circuits for example, be available to sit on the bench of this Court in the event of a tie vote. This Court being a constitutional tribunal, however, the validity of such a statute would be open to question.

[6] *Cf. Evans* v. *Gore*, 253 U. S. 245, 247 (1920); *Tumey* v. *Ohio*, 273 U. S. 510, 522 (1927); *People* v. *Edmonds*, 15 Barb. 529 (N. Y. 1853).

[7] United States Supreme Court Rule 38.

24 of which are still pending.[8] It is likely that the interposition of this Court will be requested in some of these cases. The attorneys for defendants in many other Sweeney cases join in this petition for rehearing. Though the cases involve for the most part the law of states (and the District of Columbia) other than New York, the issues of policy urged here are implicit in all of them and the fundamental common law pattern is similar; a ruling by this Court would have great persuasive effect. A failure to rule will encourage further multiplicity of suits and the continued emergence of a crazy-quilt of conflicting rulings in the field of Federal constitutional law and the common law properly applicable to charges made against national legislators.

Although aside from the constitutional issues this case nominally presents questions of New York law only, these questions arise in a sphere in which the law of New York is of prime national importance. All four of the major press association news services are directed from and have their principal offices in New York.[9] Out of 265 feature and picture syndicates in the United States and Canada, 100 are located in New York and practically all of the syndicated columns issue out of New York.[10] New York is the headquarters of 8 principal newspaper chains.[11] In the book field, 141 publishing firms accounting for more than 70% of all the titles issued by the 263 publishers in this country who in 1941 published 5 books or more, are New York concerns.[12] Finally, all four of the national

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[8] See Exhibit B.

[9] Associated Press, United Press, Trans-Radio Press and International News Service. BROADCASTING—1942 Year Book.

[10] Editor & Publisher—The Fourth Estate, 1942 International Year Book.

[11] *Ibid.*

[12] The Publishers Weekly—Annual Summary Number, January 17, 1942.

radio networks operate from New York City. These networks together in 1941 accounted for 41% of the broadcast income of the entire nation and controlled well over half of all the stations in the country.[13]

If a given type of utterance is adjudged libelous *per se* in New York, it is automatically barred in large part from the rest of the country including jurisdictions where such material has been held not actionable. To take an actual example: the Circuit Court of Appeals for the Third Circuit has since the decision of the Circuit Court of Appeals for the Second Circuit herein unanimously held that petitioner's publication is not libelous *per se*.[14] Since, however, much of the material circulating in the Third Circuit emanates from New York and therefore must be prepared with the law of that state in mind, discussion of the attitudes of public officials toward political, racial and religious minorities will be strait-jacketed there despite the decision of the highest Federal court in that area.

Errors of the Court Below

Though the grounds of this Court's division have not been disclosed, the division may have stemmed from the question whether the challenged utterance was actionable as a libel *per se* under the law of the State of New York. The answer to this question apart from policy, interpretation and constitutional aspects, depends (a) on the existence of a public official rule in New York, and (b) on whether, in the absence of such a rule, the challenged publication meets the requirements of libel *per se* in the light of the independent "state of mind" rule.

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[13] The World Almanac for 1942, page 860; see also Report on Chain Broadcasting, Federal Communications Commission, Commission Order No. 37, Docket No. 5060, May, 1941.

[14] *Sweeney* v. *Philadelphia Record Co.* (three cases), decided February 25, 1942, dismissing complaints on motion.

1. In our main brief we have adduced a long line of Appellate Division cases establishing the existence of a public official rule in New York.[15] It is of great significance that the Court below failed to negate Judge CLARK's analysis in favor of the existence of the rule. Respondent has been unable to point to a single New York case holding that any imputation against a public official, which, like that in the instant case, charges less than corruption or gross incompetence in office, is libelous *per se* no matter how false and harmful to reputation it may be. Such imputations are actionable only on allegation of special damage,[16] which is not claimed here.

2. An attempt was made to distinguish the public official cases on the ground that they are merely instances of the defense of fair comment. Since all these cases came up on motions addressed to the pleadings,[17] they have nothing to do with fair comment which is a matter of affirmative defense. The falsity of the charges was admitted and there could be no doubt that they were harmful to reputation. The sole issue was libel or no libel and the courts held that with reference to public officials only imputations of corruption or gross incompetence were libelous *per se*. The doctrine of fair comment may excuse assertions in the nature of comment which are libelous *per se*; the doctrine has nothing to do with non-libelous words.

3. There is no Court of Appeals case dealing with public officials subsequent to the Appellate Division cases hereinbefore referred to, which in any way discredits them. It is expected that the case of *Hall* v. *Binghamton Press*

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[15] Pages 13-19.

[16] See main brief at page 4, note 3; page 15.

[17] See Pet. Rep. Br. on Cert.

Co.[18] decided by the New York Appellate Division, Third Department on March 4, 1942, in a three to two decision against a Congressman's claim of libel *per se*, will be appealed to the New York Court of Appeals. That case may afford that court an opportunity to discuss the existence of the public official rule in New York State which it has not discussed since the *Bennet* case.[19] If the instant case were restored to the docket for reargument this court would have before it the final outcome of the *Hall* case, which may be of aid even though that case has developed in terms of fair comment on an incontrovertible fact rather than as a case under the public official rule.

4. Respondent attacks the New York rule under which imputations as to state of mind, no matter how unpopular, are never libelous *per se*, in part by questioning the existence of the group libel rule of which it is a necessary concomitant. The *Kirkman* case[20] which he relies upon to this end, holds merely that legal entities known as unincorporated associations (in this instance a labor union) may sue for libel. It does not affect the underlying New York law that such indeterminate groups as "the Catholics," "the Anarchists," "the Jews," "the Wets," or "the Democrats" may not sue.[21] This group libel rule makes mandatory the correlative "state of mind" rule, recognized by Judge HOLMES in the case of "the Irish,"[22]

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[18] Judgment in the *Hall* case, involving a charge of Quislingism, having been entered on April 3, 1942, the appellant has sixty days in which to bring his appeal to the Court of Appeals. New York Civil Practice Act § 592. We are informed by counsel for the defendant that counsel for the plaintiff Congressman has publicly announced his intention to take an appeal.

[19] *Bennet* v. *Commercial Advertiser Assn.*, 230 N. Y. 125 (1920).

[20] *Kirkman* v. *Westchester Newspapers Inc.*, 287 N. Y. 373, decided January 22, 1942.

[21] For a recent expression of this rule by the N. Y. Ct. of Appeals, see *Gross* v. *Cantor*, 270 N. Y. 93, 96.

[22] *Fay* v. *Harrington*, 176 Mass. 270, our Main Brief, page 21.

a rule which is completely disregarded by the decision below. Respondent makes much of the fact that the charge here was of bigotry against the Jews and it is true that the instant case is of special importance to Jews, as indicated by the *amicus curiae* brief filed on behalf of various Jewish organizations.[28] But the decision below applies equally to a charge of political bigotry ("reactionary", etc.) economic bigotry (a "labor baiter," and "economic royalist", etc.) or any other attitude on a public question which might be equally if not more, injurious. The Court below does not attempt to limit the sweep of the doctrine which it laid down. As the dissenting judge pointed out, it "would take in comments found day after day in the most conservative papers, either in direct statement or as quotations of responsible critics, that a public official, particularly a legislator, is pro- or anti-labor, or pro- or anti-Nazi, or pro or anti this or that race, color or creed" (R. 32).

The Interpretation of the Alleged Libel

The broad sweep of the decision below is especially unfortunate because in point of fact the instant case does not involve a charge of general prejudice against Jews. No such prejudice can be deduced from opposition to the appointment of a single Jew to a particular office. This is fully discussed in our main brief, Point IV. The full text of the column in which the item originally appeared, which may be found in *Sweeney* v. *Caller Times Publ. Co.*, 41 F. Supp. 163 (D. Tex), contained the following additional matter directly preceding the last paragraph of the publication complained of herein, and

[28] The American Jewish Committee, the B'nai B'rith, the Jewish Labor Committee, and the American Jewish Congress.

serves further to point to the meaning which we contend is the only tenable one:

> "Justice department officials say he has made an excellent record as U. S. attorney, is able, progressive, and was second on the list of judicial candidates submitted by the executive committee of the Cleveland Bar Association. First on the list was Carl Friebolin, whom justice department officials say they would have gladly appointed despite his age of 60, had he not eliminated himself voluntarily for physical reasons.
>
> "Two others on the bar association's list, Walter Kinder and Harry Brainard, were eliminated because of *big business* or *reactionary* connections. Last on the list was Dan B. Cull, former Common Pleas Court judge, and an excellent appointment except that he happens to be a *Catholic* and the last two judicial appointments in Ohio have been Catholics. So the justice department returned to the No. 2 man on the list, a Jew." (Italics ours.)

The holding that the publication complained of evidences a general bigotry toward Jews flies in the face of the accepted practice of weighting appointments on the basis of race, religion, domicile, economic background and other like and even more subtle characteristics.

Policy and Constitutional Aspects of the Instant Tie Vote

The rule of thumb adopted by this Court in the case of tie votes is that the holding of the next lower court be permitted to stand. In the normal case this may be a workable enough rule, although its fortuitous character can be plainly seen in cases like the present where there has been an even division of justices all the way up. But the rule can be downright pernicious in cases where constitutional issues are involved. For the even division leaves

undecided the fundamental inquiry both as to whether a colorable constitutional claim has been asserted and whether it should be sustained. It is a well settled rule of this Court that that construction of a Congressional statute should be adopted which avoids all doubts as to its unconstitutionality.[24] We respectfully urge that in cases where one possible interpretation of state law raises a constitutional issue and the other does not, an equal division of the justices requires an adoption of the construction which avoids the possible constitutional infirmity.

We have discussed fully in our main brief the constitutional deprivations inherent in a sustaining of respondent's position (Point III). All doubts on this score can be avoided by a construction of New York law under which, as we contend, the publication is not libelous *per se* whatever its meaning, *i. e.*, whether it charges anti-semitism or not.

The case so far having been a complete draw, we ask this Court to let the factor of deep public policy[25] cast the deciding vote. Weighing the societal interest in freedom of speech against the individual interest in reputation, we submit that in a case of presumptive liability for words all doubts should be resolved against a rule which limits the freedom of speech and of the press described by this

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[24] See *Interstate Commerce Commission* v. *Oregon-Washington R. & Nav. Co.*, 288 U. S. 14, 40 (1932) ("Our duty is to construe the statute, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."); also to the same effect *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932); *Lucas* v. *Alexander*, 279 U. S. 573, 577 (1929); *Richmond Screw Anchor Co.* v. *U. S.*, 275 U. S. 331, 342 (1928).

[25] See our Main Brief, pages 23-30.

Court as "the matrix, the indispensable condition of all other rights."[26]

Respectfully submitted,

MORRIS L. ERNST,
WILLIAM A. ROBERTS,
Solicitors for Petitioner.

Of Counsel:

BENJAMIN KAPLAN,
HARRIET F. PILPEL,
EDGAR TURLINGTON.

Also Of Counsel:

Attorneys for the Defendants in Other Cases Instituted by Respondent Involving Substantially the Same Subject Matter As the Instant Case:

	Attorney for
ALBERT M. CRAWFORD, Prescott, Arizona	Prescott Courier, Prescott, Arizona; Douglas Dispatch, Douglas, Arizona
RALPH W. BILBY, Tucson, Arizona	Tucson Daily Citizen, Tucson, Arizona
CLARENCE J. RUDDY, Aurora, Illinois	Joliet Herald-News, Joliet, Illinois
ROBERT L. BRACKEN, Dixon, Illinois	Dixon Evening Telegram, Dixon, Illinois
C. L. HUNT, Concordia, Kansas	Concordia Blade-Empire, Concordia, Kansas
J. B. MCKAY, El Dorado, Kansas	El Dorado Times, El Dorado, Kansas
RAY H. CALIHAN, Garden City, Kansas	Garden City Daily Telegram, Garden City, Kansas

[26] *Palko* v. *Connecticut*, 302 U. S. 319, 327.

	Attorney for
R. C. Russell Great Bend, Kansas	Great Bend Tribune Great Bend, Kansas
Fred M. Harris Ottawa, Kansas	Ottawa Herald Ottawa, Kansas Hutchinson News Hutchinson, Kansas Atchison Globe Atchison, Kansas Winfield Daily Courier Winfield, Kansas
Doran Kline Topeka, Kansas	Topeka State Journal Topeka, Kansas
Owen A. Hoban Gardner, Massachusetts	Gardner News Gardner, Massachusetts
Joseph T. Bartlett and Charles N. Stoddard, Jr. Greenfield, Massachusetts	Greenfield Recorder-Gazette Greenfield, Massachusetts
Arthur S. Houghton Worcester, Massachusetts	Worcester Telegram Worcester, Massachusetts
A. M. Curtis Springfield, Missouri	Springfield Newspapers, Inc. Springfield, Missouri
Frederic Twelvetrees Buffalo, New York	Buffalo Courier-Express Buffalo, New York
Wilson Price Jamestown, New York	Jamestown Post Jamestown, New York
C. O'Connor Goolrick Fredericksburg, Virginia	Fredericksburg Free Lance-Star Fredericksburg, Virginia
Richard H. Mann Petersburg, Virginia	Petersburg Progress-Index Petersburg, Virginia
A. Hamilton Bryan Richmond, Virginia	Richmond News-Leader Richmond, Virginia
H. L. Snyder Charleston, West Virginia	Charleston Gazette Charleston, West Virginia
T. H. Spence Milwaukee, Wisconsin	Milwaukee Sentinel Milwaukee, Wisconsin

I, MORRIS L. ERNST, solicitor for the above named petitioner, do hereby certify that the foregoing petition for a rehearing of this case and for stay of issuance of mandate is presented in good faith and not for delay.

MORRIS L. ERNST.

7 May, 1942.

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Supreme Court of the United States

October Term, 1941

No. 745

THE SCHENECTADY UNION PUBLISHING COMPANY

Petitioner

vs.

MARTIN L. SWEENEY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Motion for Extension of Term and for Extension of Time to File Motion for Reconsideration of Decision

MORRIS L. ERNST
WILLIAM A. ROBERTS
Solicitors for Petitioner

Supreme Court of the United States

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THE SCHENECTADY UNION PUBLISHING COMPANY,
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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Motion for Extension of Term and for Extension of Time to File Motion for Reconsideration of Decision

COMES NOW THE PETITIONER, the Schenectady Union Publishing Company by Morris L. Ernst, its solicitor, and respectfully shows:

On April 13, 1942, this Court affirmed the judgment of the Circuit Court of Appeals for the Second Circuit herein by an equally divided Court, Mr. Justice JACKSON taking no part in the consideration or decision of the case. Rehearing was applied for on May 8th and denied on May 11, 1942.

In view of this Court's consistent policy against allowing an affirmance by an equally divided court to stand as its final disposition of a controversy,[1] it would seem that its prompt denial of the Petition for Rehearing herein derived from its belief that neither a change in the number

[1] See Petition for Rehearing, pp. 1, 2.

or identity of the Justices passing on the case nor in their divergent conclusions thereon was immediately likely. The next few months, however, will witness important developments in other Sweeney litigations[2] which may have a crucial bearing hereon, as well as the final outcome of the *Hall* case,[3] which may produce a New York Court of Appeals pronouncement on the rules of libel properly referable to public officials in New York. We therefore ask for an extension of term to make possible a reconsideration of the instant case by this Court in October, if in the light of further developments reconsideration appears indicated at that time. Such an extension would accord with this Court's historic practice of holding cases over for as long as four years in order to break a tie.[4]

The national significance of the instant case and the importance of the legal issues involved were recognized by this Court when it granted certiorari and are fully developed in our Petition for Certiorari, our main brief and our Petition for Rehearing.

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[2] *E. g.*, the time within which to apply for certiorari has not yet expired in *Sweeney* v. *Philadelphia Record Co.* (3 cases) decided February 25, 1942, dismissing complaints on motion. A decision is expected shortly in *Sweeney* v. *Patterson*, argued before the Court of Appeals for the District of Columbia on February 11, 1942. *Sweeney* v. *United Features Syndicate, Inc.*, which like the instant case involves New York law, was argued before the Circuit Court of Appeals for the Second Circuit on May 18, 1942. Decisions may be rendered by the Circuit Court of Appeals in the nine Kansas cases in which appeals are pending, as shown in Appendix B to Petition for Rehearing.

[3] *Hall* v. *Binghamton Press Co.*, decided by the New York Appellate Division, Third Department, on March 4, 1942; see Petition for Rehearing, pp. 7-8.

[4] See *e. g.*, *Home Insurance Company* v. *New York*, 119 U. S. 129, 122 U. S. 636, 134 U. S. 594, originally decided at the October term, 1886 and not finally reargued until May 18-19, 1890; *The Selma Rome & Dalton R. R. Co.* v. *U. S.*, 122 U. S. 636, 637, 139 U. S. 560 (petition granted March 28, 1887, reargument had on March 25-26, 1891); *U. S.* v. *Sischo*, 260 U. S. 699, 262 U. S. 165 (rehearing granted November 23, 1922, reargument had April 23, 1923).

WHEREFORE, we respectfully move that for the purposes of this case the present term be extended to the 26th day of October, 1942, and that petitioner's time within which to file a motion for a reconsideration of the judgment herein and the decision denying rehearing be likewise extended.

MORRIS L. ERNST,
WILLIAM A. ROBERTS,
Solicitors for Petitioner.

Of Counsel:
BENJAMIN KAPLAN,
HARRIET F. PILPEL,
EDGAR TURLINGTON.

I, MORRIS L. ERNST, Solicitor for the above named Petitioner, do hereby certify the foregoing motion for extension of term and extension of time to file motion for reconsideration is presented in good faith and not for delay.

Dated, New York, May 19, 1942.

MORRIS L. ERNST.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 745.

THE SCHENECTADY UNION PUBLISHING COMPANY, *Petitioner*,

v.

MARTIN L. SWEENEY.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

OPPOSITION TO MOTION FOR EXTENSION OF TERM AND FOR EXTENSION OF TIME TO FILE MOTION FOR RECONSIDERATION OF DECISION.

The respondent, Martin L. Sweeney, by his counsel, John O'Connor, opposes the motion filed herein and for cause of his opposition says:

This Court affirmed the judgment of the Second Circuit Court of Appeals on April 13, 1942, and on May 11, 1942, denied a petition for rehearing filed by the petitioner. On

May 18, 1942, the mandate of this Court was issued to the District Court of the United States for the Northern District of New York, and the case will in due course be assigned for trial on the merits.

While this latest move by counsel for the petitioner might be credited to unparalleled persistency, rather than to harassment of the respondent, we most earnestly submit that the motion should not be seriously considered in the light of any of the reasons advanced by the petitioner.

On page 2 of its motion, petitioner says:

> "The next few months, however, will witness important developments in other Sweeney litigations which may have a crucial bearing hereon, as well as the final outcome of the *Hall* case, which may produce a New York Court of Appeals pronouncement on the rules of libel properly referable to public officials in New York."

The foregoing statement by the petitioner is, in its pertinency to the case herein, without any foundation in fact whatsoever.

Firstly, no appeal in the *Hall* case has been taken to the New York Court of Appeals, up to this writing.

Secondly, the *Hall* case involved facts which were admitted to be true, and hence the decision turned solely on a question of *fair comment and criticism,* having no relevancy, whatsoever, to the instant case. One of our authorities for the foregoing is none other than the solicitor for the petitioner, who in a letter, dated April 2, 1942, addressed to the Honorable Chief Justice of this Court, had this to say in reference to the *Hall* case.

> "*Hall* v. *Binghamton Press Co.,* decided by the Appellate Division, Third Department, on March 4, 1942, is simply an illustration of 'fair comment on facts truly stated,' which has nothing to do with the present case."

We agree.

In *Sweeney* v. *Philadelphia Record Company, et al.* (pet. motion p. 2, note 2), the Circuit Court of Appeals for the Third Circuit predicated its decision principally on a pro-

vision of the Pennsylvania Constitution, and distinguished the decision in the *Schenectady Union Publishing Company* case, as founded on the law of New York State—all of which was before this Court on the oral argument herein. The possibility, or probability, of an application for a writ of certiorari being made to this Court in the *Philadelphia Record* case, obviously would present no shadow of reason for granting petitioner's motion, even if it were not the fact that on May 21, 1942, Representative Sweeney advised counsel that because of the shortness of time a petition for certiorari to this Court in the *Philadelphia Record* case will not be filed. Other cases still pending in the State of Pennsylvania may furnish opportunities for a review of the Pennsylvania law of libel as stated by the Third Circuit Court of Appeals.

As to *Sweeney* v. *United Feature Syndicate, Inc.* (pet. motion p. 2, note 2), pending in the Circuit Court of Appeals for the Second Circuit, while that case involves again the New York law of libel, the question there is whether or not the trial court properly instructed the jury.

In reference to "the nine Kansas cases" (pet. motion p. 2, note 2), the petitioner must surely know that the appeals therein are from Orders of the District Court, dismissing the cases for lack of prosecution, and the only result of a reversal of such Orders would be to restore the cases to the trial calendar.

The cases cited by petitioner at page 2, note 4, concerned rearguments, where petitions for rehearing filed in due course *within the term*, had been *granted*. The petition for rehearing in the instant case has been *denied*. Further, none of the cases relied on involved actions founded in tort, and all presented entirely dissimilar situations than that of the case at bar.*

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* *Home Insurance Company* v. *New York*, 134 U. S. 594, was to recover a tax imposed by legislative act of the State; *The Selma Rome & Dalton R. R. Co.* v. *United States*, 139 U. S. 560, was predicated upon an alleged breach of contract; *United States* v. *Sischo*, 262 U. S. 165, involved an action for the recovery of a penalty for bringing of merchandise illegally into the country.

Petitioner's reference (p. 2) to "The national significance of the instant case" must be considered to be in the same category as other expressions found in previous briefs filed herein by the petitioner, such as the "group libel rule," the "state of mind rule," the "public official rule," all originations, although often embraced within quotation marks.

It is respectfully—if somewhat impatiently—submitted that an end should be put to these proceedings, as the motion herein is obviously based upon nonexistent grounds, and, if granted, further proceedings would necessarily be staggered over a period of many months, all operating so as to unduly delay a final determination of the cause on the merits, with the consequent result of working an undue hardship on this respondent. It is therefore respectfully urged that the motion be denied.

Respectfully submitted,

JOHN O'CONNOR,
Counsel for Respondent.

Of Counsel:
WILLIAM F. CUSICK,
WILLIAM F. CONWAY.

No. 745. SCHENECTADY UNION PUBLISHING CO. *v.* SWEENEY. Certiorari, 314 U. S. 605, to the Circuit Court of Appeals for the Second Circuit. Argued March 31, April 1, 1942. Decided April 13, 1942. *Per Curiam:* The judgment is affirmed by an equally divided Court. MR. JUSTICE JACKSON took no part in the consideration or decision of this case. *Mr. Morris L. Ernst*, with whom *Messrs. William A. Roberts, Benjamin Kaplan*, and *Edgar Turlington* were on the brief, for petitioner. *Mr. John O'Connor*, with whom *Mr. William F. Cusick* was on the brief, for respondent. Briefs of *amici curiae* were filed by *Mr. Edmund D. Campbell* on behalf of the American Civil Liberties Union; by *Messrs. Milton Handler, Henry H. Nordlinger*, and *David Sher* on behalf of the American Jewish Committee et al.; and by *Mr. Charles J. Tobin* on behalf of the New York State Publishers Assn.,—urging reversal. Reported below: 122 F. 2d 288.